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No.

In The
Supreme Court of The United States
October Term 1997

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, MINNEAPOLIS BRANCH, ET AL,
Petitioners,

v.

METROPOLITAN COUNCIL, A PUBLIC BODY CORPORATE AND POLITIC,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the All Writs Act, in the absence of any other source of jurisdiction, authorizes removal to federal court of an action based entirely on state law.

2. Whether *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), and the artful pleading doctrine create an exception to the well-pleaded complaint rule when there is no federal preemption of the state claim.

PARTIES TO THE PROCEEDINGS BELOW

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Minneapolis Branch of the National Association for the Advancement of Colored People ("NAACP") and the other plaintiffs in the above-captioned case respectfully pray that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on September 17, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was rendered on September 17, 1997, and is reported at 125 F.3d 1171 (8th Cir. 1997). A copy of the opinion is attached hereto as Appendix ("Apdx.") A, pp. 1-12. The opinion of the United States District Court for the District of Minnesota granting respondent's motion to dismiss was rendered on February 5, 1996. The district court's opinion and order are unreported. A copy of the district court's opinion and order is attached hereto as Apdx. B, pp. 13-32. The memorandum and order of the United States District Court for the District of Minnesota granting in part and denying in part petitioners' motion to remand was rendered on February 5, 1996. The district court's memorandum and order are unreported. A copy of the district court's memorandum and order is attached hereto as Apdx. B, pp. 33-40.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on September 17, 1997.

Petitioners have timely filed this petition for writ of certiorari, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES & CONSTITUTIONAL PROVISIONS INVOLVED

The following statutes and Constitutional provisions are involved in this case and are set forth in Apdx C: 28 U.S.C. § 1331 (Federal question); 28 U.S.C. § 1367 (Supplemental jurisdiction); 28 U.S.C. § 1441 (Actions removable generally); 28 U.S.C. § 1446 (Procedure for removal); 28 U.S.C. § 1447 (Procedure after removal generally); 28 U.S.C. § 1651 (Writs); Minnesota Constitution, Article I, § 2 (Rights and privileges); Minnesota Constitution, Article XIII, § 1 (Uniform system of public schools).

STATEMENT OF THE CASE

This case raises important issues concerning the limits on the jurisdiction of federal courts. In an action based solely on state law on the face of the well-pleaded complaint, the Eighth Circuit held that removal was proper where the district court exercised federal jurisdiction under the All Writs Act and the so-called "artful pleading" doctrine.

The petitioners are the Minneapolis Branch of the NAACP and six Minneapolis schoolchildren, through their parents, bringing this action on behalf of a class of children enrolled, or expected to be enrolled during the pendency of the lawsuit, in the Minneapolis public schools. The number of class members exceeds 40,000. The petitioners originally filed

their complaint on September 19, 1995, in Hennepin County District Court, Minneapolis, Minnesota. (Apdx. D, pp. 204-29.) The complaint alleges that students of the Minneapolis public schools are receiving an education that is both inadequate as a matter of law because it is segregated by race and income and therefore illegal, and inadequate as a matter of fact because it is substandard by any reasonably objective measure; and that this constitutes a denial of both the right to an adequate education under the Education Clause of the Minnesota State Constitution, Article XIII, Section 1 (Apdx. C, p. 203), and the right to the equal protection of the law under the Equal Protection Clause of the Minnesota State Constitution, Article I, Section 2 (Apdx. C, p. 202).

The claims in petitioners' complaint, which seek to redress the denial of the fundamental right to an adequate education, arise exclusively under state law. This Court has expressly held that the federal Constitution does not recognize education as a fundamental right. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

Defendants include the State of Minnesota and various state officials, branches and departments. Among the 22 defendants named in the complaint was the Metropolitan Council, a political subdivision of the State of Minnesota, established to coordinate the planning and development of the housing, social, economic and infrastructure needs of Minneapolis and St. Paul metropolitan area. (Apdx. D, pp. 216.)

On October 19, 1995, the Metropolitan Council removed this case to the United States District Court for the District of Minnesota. (Apdx. B, pp. 41-46.) The Metropolitan Council asserted removal jurisdiction under the "artful pleading" doctrine and the All Writs Act, 28 U.S.C. § 1651 (Apdx. B, pp. 43-45), contending that this case was an effort to relitigate claims settled in a prior federal action, *Hollman v. Cisneros* (the "*Hollman*" case), Civil Action No. 4-92-712 in the United States District Court for the District of Minnesota, in which the Metropolitan Council was also a defendant. (Apdx. B, pp. 43-45.) The *Hollman* case was a class action challenging the concentration of public housing in certain neighborhoods in Minneapolis.

Although remanding the claims against all other defendants, the district court upheld the removal by the Metropolitan Council under both the artful pleading doctrine and the All Writs Act. The district court ruled that this action was removable by the Metropolitan Council because plaintiffs were merely reasserting federal claims against the Metropolitan Council already litigated in the *Hollman* case. (Apdx. B, pp. 33-40.) The district court then granted the Metropolitan Council's later motion to dismiss the complaint on the ground that all claims against the Metropolitan Council were barred under *res judicata*, by the prior Consent

Judgment entered in the *Hollman* case. (Apdx. B, pp. 13-32.)[1]

With regard to the Metropolitan Council, the complaint in this action contains the following material allegations:

> 19. Defendant Metropolitan Council is a political subdivision of the State of Minnesota, established by Minn. Stat. § 473.123, created to coordinate the planning and

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[1] In both refusing to remand this action to state court and in dismissing the complaint, the district court concluded that the claims in this action were identical to the claims in the *Hollman* case, and thereby barred by the final judgment in that case as a matter of *res judicata*. (Apdx. B, pp. 31-32.)

The claims of the *Hollman* suit raised exclusively issues of public housing. Specifically, the plaintiffs alleged that the defendants, various federal and state agencies, including the Metropolitan Council, administered the public housing and Section 8 existing housing programs in Minneapolis so as to create and perpetuate patterns of racial segregation, in violation of the United States Constitution, and federal and state laws. The plaintiffs in *Hollman* alleged that the Metropolitan Council had abandoned efforts to encourage the spread of low income housing throughout the metropolitan area. There were no claims related to education or the Minnesota State Constitution's Education Clause. (Apdx. B, pp. 63-117.)

The *Hollman* litigation was settled on April 20, 1995, and provided, *inter alia*, that the defendants would contribute in excess of $100,000,000 in federal and local resources to promote the deconcentration of public housing in Minneapolis. The purpose of the decree is "to set out a series of actions to be taken by Defendants which will promote equal housing opportunity, expand and maximize geographic choice in assisted housing, and encourage racial integration." (Apdx. B, pp. 121.)

development of the Twin Cities metropolitan area. The Metropolitan Council has the same functions, rights, powers, duties, privileges, immunities, and limitations as are provided for housing and redevelopment authorities created for municipalities. Pursuant to Minn. Stat. § 121.1601, the Metropolitan Council periodically consults with the Office of Desegregation/Integration of the Department of Education to coordinate school desegregation/integration efforts with the housing, social, economic, and infrastructure needs of the metropolitan area.

* * *

36. Specifically, the defendants have engaged in or permitted the following practices, which have caused or contributed to the segregation of the Minneapolis public schools:

(a) Defendants have neither developed nor implemented and enforced effective rules or an effective plan for desegregation/integration or for remedying the inadequacy of the education being received by the plaintiff class, although defendants know and have known for some time of segregation and the inadequacy of education in the Minneapolis public

schools. For example, although defendant State Board of Education has a rule that minority enrollment in a school may not be more than 15 percent above the districtwide average for minority enrollment, defendants have wholly failed to enforce this rule, and have knowingly permitted approximately 25 schools to be segregated in violation of the rule, including seven in the city of Minneapolis. Defendant State Board of Education has further replaced as chairperson Georgina Stephens, an African-American board member, because Ms. Stephens expressed an interest in developing and implementing an effective desegregation plan. Defendant State Department of Education has also laid off and discharged employees responsible for testing, measuring, and improving educational outcomes, a circumstance that will render increasingly difficult providing plaintiff class members with an adequate education.

(b) Defendants have authorized, approved, and consented to school construction and other capital expenditures and improvements with respect to education that have reenforced and contributed to the entrenchment of existing concentrations of poverty and racial isolation and inadequacy of education in the Minneapolis public schools.

(c) Although obligated to do so, the defendants have failed to coordinate school desegregation/ integration efforts with the housing, social, economic, and infrastructure needs of the metropolitan area.

(d) Defendants have adopted, implemented, and permitted policies and practices that result in housing segregated by race and socioeconomic status in the metropolitan area, and thereby result in segregation by race and socioeconomic status in the Minneapolis public schools. Such policies and practices include, but are not limited to, for example, failure of the Metropolitan Council and the State to enforce Policy 39 from the June 1985 Housing

> Development Guide; failure of the Metropolitan Council to require adoption and enforcement by suburban communities of comprehensive plans including efforts to promote the development of low and moderate income housing; failure of defendants to take steps to prevent and eliminate exclusionary zoning practices by suburban communities; disproportionate investment in infrastructure in suburban communities with the effect of intensifying and perpetuating racial and socioeconomic segregation; failure to enforce Minnesota laws against segregation that would curtail and eliminate such practices as red-lining, steering, and restrictive covenants; and the implementation of transportation policies that have encouraged and enabled "white flight" to suburbs.

(Apdx. D, pp. 216, 222-25.)

The *Hollman* case was settled by a consent decree requiring the Metropolitan Council to undertake certain actions in conjunction with the planning and provision of low income housing in the Twin Cities metropolitan area. (Apdx. B, pp. 118-90.) In addition, the decree establishes a procedure for "disputes relating to this Decree in any manner," which procedure the

parties are required to pursue before seeking relief from the federal court. (Apdx. B, p. 169.) Finally, the decree provides that the court retains jurisdiction over the case "for the purpose of enabling any party to this proceeding to apply to the Court for such further orders as may be necessary or appropriate for the enforcement of this Decree." (Apdx. B, p. 174.) The decree further provides,

> In the event any occurrences outside the control of the parties frustrate the completion of the actions agreed to herein, any party may apply to the Court for modification of this Decree, but not to increase any party's obligations under the Decree. Prior to the submission of any dispute under the Decree to the Court, the parties shall comply with the dispute resolution procedure set out in paragraph 97.

(*Id.*) The Metropolitan Council made no efforts to invoke any of these remedial portions of the *Hollman* decree in removing this case to federal court and in seeking and obtaining dismissal on the ground of *res judicata*.

The Eighth Circuit Court of Appeals upheld the district court's dismissal of the action and held that the district court properly exercised removal jurisdiction under the authority granted federal courts by the All Writs Act. (Apdx. A, pp. 1-12.) The court held:

> In this suit, the NAACP and the student class seek state injunctive relief against the Met Council concerning the very matters the

> *Hollman* decree governs. Although this class action is not removable under the federal removal statutes, the district court was confronted with a situation where parties subject to the district court's continuing jurisdiction under the *Hollman* decree--the NAACP and those student class members belonging to the *Hollman* class--were resorting to a state forum to relitigate settled and released claims.

(Apdx. A, p. 6.) Under these circumstances, the court held that the district court was authorized in removing from state court under the All Writs Act to protect the integrity of the federal consent decree entered in *Hollman*. (*Id.*)

From this decision, NAACP and the other plaintiffs named petition this Court for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD GRANT CERTIORARI TO MAKE CLEAR (1) THAT THE ALL WRITS ACT DOES NOT CONFER AN INDEPENDENT SOURCE OF JURISDICTION TO A FEDERAL COURT; AND (2) THAT THE ARTFUL PLEADING DOCTRINE DOES NOT CREATE AN EXCEPTION TO THE WELL-PLEADED COMPLAINT RULE WHEN THERE IS NO FEDERAL PREEMPTION OF A STATE CLAIM.

A. The Eighth Circuit's Ruling That the All Writs Act Confers an Independent Source of Jurisdiction Creates a Direct Conflict Within the Circuits, Contradicts Supreme Court Precedent, Grants a Party Power Exclusively Reserved for the Judiciary, and Disregards the Important Public Policy of Federalism.

The power of a federal court under the All Writs Act to remove a state action without any other source of jurisdiction goes to the very heart of the historical limits to federal court jurisdiction and the traditional principles of federalism. The Eighth Circuit Court of Appeals utilized an unusual and unjustified reading of the All Writs Act to uphold a lower court's refusal to remand a class action based entirely on state constitutional claims back to state court, where it belongs. Certiorari is warranted here because (1) a direct conflict exists in the circuits regarding this issue; (2) the Eighth Circuit's ruling contradicts Supreme Court precedent; (3) the court's ruling grants a party power reserved for the judiciary; and (4) the court's ruling disregards principles of federalism.

First, certiorari is justified here because a direct conflict continues among the circuits regarding whether a federal district court may use the All Writs Act to remove state court claims in the absence of any other source of jurisdiction. The All Writs Act provides that federal courts may issue "all writs necessary or appropriate in aid of their

respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (Apdx. C, p. 201.) Although the Supreme Court has made it clear that the All Writs Act does not provide federal courts with an independent grant of jurisdiction, *McIntire v. Wood*, 7 Cranch 504, 506 (1813); *Rosenbaum v. Bauer*, 120 U.S. 450, 453-54 (1887), the Court expressly left open the question of whether the All Writs Act may have broader powers than statutorily defined "where exceptional circumstances require it." *Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985).

Since *Pennsylvania Bureau of Correction*, a number of circuits have authorized the use of the All Writs Act as a source of independent jurisdiction in certain circumstances. *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425 (2d Cir. 1993); *Sable v. General Motors Corp.*, 90 F.3d 171 (6th Cir. 1996); *Matter of VMS Sec. Litig.*, 103 F.3d 1317 (7th Cir. 1996). In *In re Agent Orange*, the Second Circuit affirmed the lower court's denial of a motion to remand, relying on the All Writs Act as the basis for permitting removal. 996 F.2d at 1431. The Second Circuit found that a district court, in exceptional circumstances, may use its All Writs Act authority to remove an otherwise non-removable state court case in order to "effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *Id.* (citations omitted).

The Second Circuit, however, did not authorize the use of the All Writs Act for any removal action. Instead, the

court warned that "the All Writs Act is not a jurisdictional blank check." *Id.* The use of the All Writs Act was proper only because of "exceptional circumstances:"

> The district court was not determining simply the preclusive effect of a prior final judgment on claims or issues expected to be raised in subsequent collateral proceedings; it was enforcing an explicit, ongoing order against relitigation of matters it already had decided, and guarding the integrity of its rulings in complex multidistrict litigation over which it had retained jurisdiction.

Id. In an earlier decision, the Second Circuit conceded that the Supreme Court has not endorsed the use of the All Writs Act for removal of state actions to federal courts. *See Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 863 (2d Cir. 1988) ("[T]he Supreme Court expressly left open the question of the availability of the All Writs Act in exceptional circumstances to issue the writ when traditional statutory procedures clearly are inadequate."). In *Yonkers Racing Corp.*, the Second Circuit authorized use of the All Writs Act to remove an action from state court where the court believed that issues raised by the state court action went "to the very essence" of an existing federal consent decree. *Id.* at 865. The court expressed concern that without removal, the

defendants might be subjected to inconsistent orders. *Id.* at 863.[2]

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[2] Even under the Second Circuit's application of the All Writs Act, removal of the present case was unwarranted. Lower courts in the Second Circuit still show great reluctance in employing the All Writs Act for removal of state claims to federal court and emphasize that the All Writs Act applies only in "limited circumstances." *Mongelli v. Mongelli*, 849 F. Supp. 215, 220 (S.D.N.Y. 1994). One lower court held that possible inconsistencies between federal and state rulings over the same subject matter were not enough to warrant removal. *See Pan Atlantic Group, Inc. v. Republic Ins. Co.*, 878 F. Supp. 630, 634 (S.D.N.Y. 1995) (stating that a "theoretical potential for inconsistent or conflicting judgments in the state court and federal actions" did not warrant removal).

Although the Eighth Circuit found a strong connection between the *Hollman* decree and any remedy in this case, the relationship, if any, is far from being so "extraordinary" as to warrant removal. *See, e.g., In re Agent Orange*, 996 F.2d at 1431 (finding that any attempt by state courts to resolve claims would necessarily require "relitigation" of matters already settled in federal court); *Yonkers Racing Corp.*, 858 F.2d at 863 (ruling that state claims went to the "very essence" of the federal consent decree). No such showing can be made here, because resolution of the state claims asserted by the petitioners would not necessarily frustrate, contradict, or even relate to the *Hollman* decree. Certainly, relief in this action going to the transportation, infrastructure, and economic development responsibilities of the Metropolitan Council would in no sense touch upon the *Hollman* consent decree. Likewise, in the area of housing, the *Hollman* consent decree applies to a limited number of persons in a limited geographic area. Relief in this action related to housing for persons not in the *Hollman* class or not residing in the housing projects covered by *Hollman*, would have no bearing or effect on the *Hollman* decree. Further, as shown, the plaintiff class in this case is far broader than and different from the class of *Hollman* plaintiffs.

In direct conflict with the Second, Sixth and Seventh Circuits, at least two circuits have explicitly rejected the All Writs Act as a source of federal jurisdiction in a state claim. *See, e.g., Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C.*, 992 F.2d 932 (9th Cir. 1993); *Hillman v. Webley*, 115 F.3d 1461 (10th Cir. 1997). In *Westinghouse*, for example, the court found that because the district court did not have jurisdiction over the underlying claim, the court could not remove it to federal court under the All Writs Act. *Id.* at 937. The Ninth Circuit ruled that "the Act 'does not operate to confer jurisdiction . . ., since it may be invoked by a district court only in aid of jurisdiction which it already has.'" *Id.* (quoting *Stafford v. Superior Court of Cal., In and For Los Angeles County*, 272 F.2d 407, 409 (9th Cir. 1959)).

Second, in addition to the direct circuit conflict, the ruling of the Eighth Circuit here is contrary to Supreme Court precedent. This Court has strictly limited the reach of the All Writs Act, stating that the Act confers only a "residual source of authority." *Pennsylvania Bureau of Correction*, 474 U.S. at 43. The power under the Act according to this Court is intended "to be used sparingly." *Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n*, 507 U.S. 1301, 1303 (1993).

Such non-*Hollman* class members are entitled to relief in this action, regardless of whether it may contradict the provisions of the *Hollman* decree.

Although this Court expressly left open whether the All Writs Act may have broader powers than statutorily defined in certain circumstances, it has specifically limited the All Writs Act to issue writs only "that are not otherwise covered by statute." *Pennsylvania Bureau of Correction*, 474 U.S. at 43. "Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Id.* Here, the Eighth Circuit did not uphold a district court's use of a writ in a circumstance "not otherwise covered by statute."[3] The removal of state claims to federal courts is governed expressly by the federal removal statutes. *See* 28 U.S.C. § 1441. (Apdx. C, pp. 192-93.) The Eighth Circuit's ruling upholds a use of the All Writs Act explicitly prohibited by this Court.

Third, the Eighth Circuit's ruling granted the Metropolitan Council, a party, a power exclusively reserved for the judiciary. In situations where courts have used the All Writs Act when a state court action threatens to frustrate a federal consent decree, federal courts have typically utilized the Act in one of two ways. First, some federal courts, relying on their jurisdiction over the original class action suit and the class members, have utilized the All Writs Act to issue orders in the class action enjoining class members from pursuing state

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[3] In fact, the district court never issued a writ. It merely denied Petitioners' motion to remand after the Metropolitan Council, a private party, had removed the action to federal court. *See infra*.

court actions that would conflict with the settlement order. *See White v. National Football League*, 41 F.3d 402, 409 (8th Cir. 1994) (enjoining state actions that were related to a federal district court approved settlement agreement in complex class action). Second, some courts have utilized the Act to order actions removed from state court to federal court, and to subsequently bar litigation of the removed action. *See Matter of VMS Sec. Litig.*, 103 F.3d 1317, 1323-26 (7th Cir. 1996) (holding that "a federal district court may appropriately use the All Writs Act to remove and enjoin the prosecution of subsequent state court claims" in order to enforce its ongoing orders in prior rulings over which it had expressly retained jurisdiction).

Here, the Eighth Circuit held that the district court's denial of petitioners' motion to remand "was proper under the All Writs Act." (Apdx. A, p. 7.) Although using the justification of the All Writs Act, the district court never issued a writ or otherwise ordered removal to federal court. Instead, it merely denied petitioners' motion to remand. Rather than removing the action by writ, or enjoining the parties of the federal consent decree from litigating in state court, the court merely affirmed the removal by the Metropolitan Council, a private litigant. In doing so, the court unjustifiably delegated and transferred its judicial power under the Act to a private party in this lawsuit.

Fourth, the use of the All Writs Act to remove state claims to federal court in the absence of any other authority for formal jurisdiction contravenes the fundamental policies of

federalism. "Because the effect of removal is to deprive the state court of an action properly before it, removal raises significant federalism concerns." *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 365 (5th Cir. 1995) (citing *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 809 (1986)). One of the basic tenets of federalism is that federal courts have limited jurisdiction. "The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded or evaded." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). As this Court declared in *Healy v. Ratta*:

> The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution . . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined.

292 U.S. 263, 270 (1934).

This Court has recognized the inherent dangers in an overreaching federal court:

> Just as the separation and independence of the coordinate branches of the federal government serve to prevent the accumulation of excessive

> power in any one branch, a healthy balance of power between the States and the federal government will reduce the risk of tyranny and abuse from either front . . . . In the tension between federal and state power lies the promise of liberty.

Gregory v. Ashcroft, 501 U.S. 452, 458-59 (1991).

Under the Eighth Circuit's use of the All Writs Act, the federal court is overreaching the powers granted to it by the Constitution and by statute. With such power, the federal court has denied the state courts of Minnesota a power reserved exclusively for the states, namely, their right to decide matters arising solely under state law.[4] Further, the Eighth Circuit's use of the All Writs Act has deprived a class of more than 40,000 schoolchildren from litigating their state constitutional claims in their state's courts.

B. The District Court's Use of the Artful Pleading Doctrine to Remove the Action Perpetuates a Direct Circuit Split, Conflicts With the Traditional Limits to Federal Jurisdiction, and Violates the Fundamental Principles of Federalism.

The lower court's reliance on the artful pleading doctrine to remove the instant case to federal court

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[4] Moreover, this Court has emphasized that education, the subject matter of this case, is a traditional concern of the States. *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974).

inappropriately expands the removal powers of the federal courts. In an action based solely on state law on the face of a well-pleaded complaint, the district court took an unjustified expansive reading of the artful pleading doctrine. Certiorari is warranted because (1) there is a direct circuit conflict regarding the applicability of the artful pleading doctrine under *Federated Dep't Stores, Inc. v. Moitie* ("*Moitie*"), 452 U.S. 394 (1981); (2) the lower court's reading of the artful pleading doctrine goes beyond traditional limits to federal jurisdiction; and (3) the artful pleading doctrine exception followed by the lower court here violates fundamental principles of federalism.

The artful pleading doctrine serves as a limited exception to the well-pleaded complaint rule, which governs removal under 28 U.S.C. § 1441(b) permitting removal of a "civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States." (Apdx. C, p. 192.) Under that section, a state court action is subject to removal only if the lawsuit could have been brought originally in federal court. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).

> The presence or absence of federal question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.

Id. The "well-pleaded complaint" rule makes the plaintiff the "master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Id.* In *Franchise Tax Bd. of State of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, this Court explained:

> For better or worse, under the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless the *plaintiff's* complaint establishes that the case "arises under" federal law. "[A] right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."

463 U.S. 1, 10-11 (1983) (emphasis in original) (citation omitted).

Prior to 1981, the artful pleading doctrine was generally limited to cases in which federal law preempted plaintiff's state claims. The vitality of the master of the complaint rule and the limited scope of the doctrine of artful pleading, however, were both rendered uncertain by this Court's decision in *Moitie*, 452 U.S. 394 (1981). In *Moitie*, the United States Supreme Court included dictum in a footnote that certain lower courts believe may have created a new branch of the artful pleading doctrine not involving preemption of federal law.

In *Moitie*, the plaintiffs filed a federal antitrust action in federal district court. The district court dismissed the

action because the plaintiffs lacked standing. Rather than appeal, two plaintiffs, Brown and Moitie, relied on the same facts to assert state law claims in a California court. The defendants removed the actions to federal court. The district court relied on the artful pleading doctrine to deny plaintiff's motion to remand. On the merits the district court found the state claims barred by the *res judicata* effect of the prior federal judgment. On appeal the Ninth Circuit affirmed removal, but found *res judicata* inapplicable because of a subsequent change in the law. The Supreme Court reversed the *res judicata* holding and devoted most of its opinion to that issue. The Court approved the removal in a footnote, noting that "at least some of the claims had a sufficient federal character to support removal" under the artful pleading doctrine. *Moitie*, 452 U.S. at 397 n.2.

In that one cryptic footnote, the Court generated substantial confusion, which has resulted in a direct circuit split over the footnote's interpretation.[5] The Second Circuit, upon which the lower court relied in removing the instant case to federal court, has created its own unique interpretation. *See, e.g., In re Agent Orange*, 996 F.2d 1425 (2d Cir. 1993); *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754 (2d Cir. 1986). According to the Second Circuit, a state claim is subject to removal under the artful pleading doctrine if:

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[5] The Supreme Court did not explain why the state claims had "sufficient federal character to support removal," and has not yet addressed the footnote in any subsequent decision.

> (1) the plaintiff previously had elected to proceed in federal court on a claim expressly grounded on federal law and (2) the elements of the subsequent state law claim are virtually identical to those of the claim previously made.

Agent Orange, 996 F.2d at 1431. The Court in *Travelers v. Sarkisian*, emphasized that Brown and Moitie had initially elected to proceed in federal court. 794 F.2d at 760. Having done so, the Second Circuit did not believe that the plaintiff was later free to recharacterize his claims under state law in an attempt to avoid the *res judicata* effect of a federal judgment. *Id.* at 761. This was the test and rationale applied by the lower court here.[6]

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[6] Even if this Court accepts the Second Circuit's unique approach to the *Moitie* footnote as applied by the district court, removal was still improper and subject matter jurisdiction lacking. The first element of the Second Circuit test requires the plaintiffs in the previous federal action and the current action removed from state court to be identical. Here, notwithstanding the lower court's finding to the contrary, there is no "significant overlap" between the plaintiffs in this case and the plaintiffs in the *Hollman* case. The complaint in this case specifically alleges that the plaintiff class consists of "all students enrolled, or expected to be enrolled during the pendency of this action, in the Minneapolis public schools." (Apdx. D, p. 217.) The class representatives are the NAACP and six identified schoolchildren. There is no limitation in the complaint confining the plaintiff class to racial minorities or residents of public housing. Rather, the class includes all schoolchildren, regardless of race or color, socioeconomic status, or place of residence.

On the other hand, the plaintiff class in the *Hollman* case has two express limitations that make the class substantially smaller than

The Ninth Circuit has also approved the use of the *Moitie* footnote to remove a state action to federal court.[7] *See, e.g., Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423 (9th Cir. 1984). In *Salveson*, the plaintiff brought

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and different from the class in this case. First, the class in *Hollman* is limited to "minority families and individuals." Second, the class is limited to such minority families and individuals who reside in certain specified public housing projects or hold Section 8 tennant-based certificates or vouchers, or are on the waiting list. (Apdx. B, pp. 79.) The second element of the Second Circuit test requires that the claims be substantially identical in the two actions. Here, there exist critical distinctions in the claims that make them anything but virtually identical. First, the claims in *Hollman* are narrow in scope, applying only to public housing in near North Minneapolis. Second, the settlement of those claims is limited as to time and scope. Here, the geographic scope of the action encompasses the entire metropolitan area, and the remedy sought by the complaint is an injunction compelling the defendants to provide the plaintiff class with an adequate education through changes in a number of different policies beyond education. While *Hollman* focused on public housing in specific geographic areas, the present case implicates not merely housing claims, but embrace the responsibilities of the Metropolitan Council in the areas of transportation, infrastructure, and economic development.

[7] The Fifth Circuit has expressed its concern over extending the rationale of the *Moitie* footnote:

> These concerns, many of which are also implicated in the context of preemption, justify construing *Moitie*, narrowly, but not abandoning it. We are simply without authority to empty footnote two of all substantive content.

Carpenter v. Wichita Falls Indep. Sch. Dist., 44 F.3d 362, 370 n.11 (5th Cir. 1995).

an action in federal court under the Sherman Act. The defendants moved for and were granted summary judgment on the ground that the Statute of Limitations barred the suit. The plaintiffs then refiled the case in state court, alleging seven state law causes of action. The defendants removed to federal court and moved to dismiss on the grounds of *res judicata* and the Statute of Limitations. The plaintiffs moved for remand to the state court. On the authority of *Moitie*, the district court permitted removal jurisdiction and granted the motion to dismiss. The Ninth Circuit affirmed, concluding after a detailed discussion of the facts and analysis of *Moitie*,

> artful pleading is properly drawn when the plaintiff "by his own conduct, either by filing originally in federal court or by acceding to federal jurisdiction after removal, has made his claim a federal one."

Id. at 1429 (citations omitted).

In a subsequent decision, however, the Ninth Circuit backed away from this expansion of removal jurisdiction. The court in *Sullivan v. First Affiliated Sec., Inc.*, recognized that the *Moitie* footnote appeared to create a new basis for the application of the artful pleading doctrine, but limited its use to situations where federal *res judicata* would apply. 813 F.2d 1368, 1378 (9th Cir. 1987). According to the *Sullivan* court, if a plaintiff has filed state claims after a federal judgment has been entered against her on essentially the same claims, the district court may invoke the artful pleading doctrine as a basis for federal jurisdiction. *Id.* at 1375-76.

"*Moitie* can thus be construed as permitting removal only of state claims filed to circumvent the *res judicata* impact of a federal judgment." *Id.* at 1376.

The use of the *Moitie* footnote by the Second and Ninth Circuits is in direct conflict with at least two other circuits' interpretations and previous Supreme Court precedent. The "enigmatic footnote" in *Moitie* has drawn serious criticism and question from both commentators and courts. The First and Sixth Circuits have each called into question whether the *Moitie* footnote still represents good law. The First Circuit suggested that the *Moitie* footnote was overruled *sub silentio* in *Franchise Tax Bd. v. Construction Laborers Vacation Trust* because the Court in that case "so strongly reaffirmed the well-pleaded complaint rule." *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 217 n.4 (1st Cir. 1987). A lower court in the Sixth Circuit has also questioned the *Moitie* footnote. In *Magic Chef, Inc. v. International Molders & Allied Workers Union*, the court explained that the *Moitie* footnote was questioned by the same treatise upon which it purported to rely:

> In brief, the Court's only intention in its footnote may have been a narrow one: to tip the balance in favor of defendant's right to a federal forum and against plaintiff's right to be master of his claim in antitrust actions when the plaintiff already had availed himself of a federal forum and when his state claims as removed would be *res judicata* from the

> earlier federal decisions. The Court's holding in this case, which affirmed a broad and strict standard for *res judicata*, seems to lend weight to this view.

581 F. Supp. 772, 776 n. 4 (E.D. Tenn. 1983 (citing 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3722 at 202 (1983 pocket part)).

Moreover, this Court in its rulings subsequent to *Moitie* calls into question whether the *Moitie* footnote represents an expansion of the limits traditionally applied to the doctrine of artful pleading. In *Franchise Tax Bd.*, which followed *Moitie*, the Court unanimously reaffirmed every major principle of removal under Section 1441(b) without mentioning, citing or in any way clarifying that earlier footnote. *See* 463 U.S. at 7 ("the jurisdictional structure at issue in [well-pleaded complaint cases] has remained basically unchanged for the past century"). Likewise, in *Caterpillar Inc. v. Williams*, another unanimous decision, the Court suggested that the artful pleading doctrine should be limited to cases involving complete preemption of the state cause of action. 482 U.S. at 392.

The district court's use of the artful pleading doctrine also violates fundamental principles of federalism. As stated above, this Court has consistently emphasized that substantial limits exist to the jurisdiction of federal courts. *See United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) ("our cases are quite clear that there are real limits to federal power"); *see also New York v. United States*, 505

U.S. 144, 155 (1992) ("no one disputes the proposition that the Constitution created a federal government of limited powers") (citations omitted). "Because the effect of removal is to deprive the state court of an action properly before it, removal raises significant federalism concerns." *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 365 (5th Cir. 1995) (citing *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 809 (1986).

CONCLUSION

Certiorari is warranted here so that this Court can reaffirm the important boundaries between state and federal courts. The Eighth Circuit's ruling threatens the traditional and constitutional limits to the jurisdiction of federal courts. First, the court's ruling that the All Writs Act confers an independent source of jurisdiction perpetuates a direct conflict within the circuits, contradicts Supreme Court precedent, grants a party powers exclusively reserved for the judiciary, and disregards the important public policy of federalism. Second, the district court's use of the artful pleading doctrine to remove the action furthers a direct circuit split, conflicts with the traditional limits to federal jurisdiction, and violates fundamental principles of federalism.

On the basis of the foregoing argument and authorities, therefore, petitioners respectfully petition this Court for a writ of certiorari to review the questions presented herein.

Dated: December 12, 1997.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, MINNEAPOLIS BRANCH ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; ET AL.

v.

METROPOLITAN COUNCIL, A PUBLIC BODY CORPORATE AND POLITIC,

96-3092MN

Decision

September 17, 1997

United States Court of Appeals
for the Eighth Circuit

No. 96-3092MN

National Association for the Advancement of Colored People, Minneapolis Branch on behalf of themselves and all others similarly situated; Bryston Hill, by his next friend Lisa Hill; Sophie Krahnke, by her next friends Steven Krahnke and Jane McLeod; Miquel McElroy, by his next friend Annie Pearl McElroy; Gregory McFarland, by his next friend Linda McFarland; Solveig Mebust; Anna Mebust, by their next friends Bruce Lynn Mebust and Kirsten Ann Scribner Mebust; Diamond Porter, by his next friend Jamie Porter,	*	Appeal from the United States District Court for District of Minnesota.
Appellants,	*	
v.	*	
Metropolitan Council, a Public Body Corporate and Politic,	*	
Appellee.	*	

Submitted: May 21, 1997
Filed: September 17, 1997

Before McMILLIAN, FAGG, and HANSEN, Circuit Judges.

FAGG, Circuit Judge.

The Minneapolis Branch of the National Association for the Advancement of Colored People (NAACP) and six Minneapolis schoolchildren, on behalf of all Minneapolis public school students (the student class), filed this class action in Hennepin County District Court against the Metropolitan Council (Met Council) and twenty-one state officials and entities (the state defendants), asserting claims under the Minnesota Constitution. The Met Council, an administrative agency that coordinates planning and development in the Minneapolis-St. Paul metropolitan area, removed the case to federal district court. The NAACP and the student class moved to remand the case to state court. The district court remanded all claims against the state defendants, but denied the motion to remand claims against the Met Council. The district court based its removal jurisdiction on the All Writs Act, 28 U.S.C. § 1651 (1994), and the artful pleading doctrine recognized in Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 397 n.2 (1981). The district court

then granted the Met Council's motion under Federal Rule of Civil Procedure 12(b)(6) to dismiss all claims against it as precluded by an earlier federal judgment. The NAACP and the student class appeal, contending their claims against the Met Council were not removable, and even if they were, the district court improperly applied federal res judicata law because this case and the earlier lawsuit involve different causes of action against the Met Council as well as different parties.

The issues in this appeal spring from the relation of this action to an earlier class action, Hollman v. Cisneros, brought in federal court by the NAACP and a class consisting of minority persons and their families living in, or applying for, low-income housing in Minneapolis (the Hollman class). Filed in 1992, the Hollman lawsuit claimed public housing in Minneapolis was concentrated in racially segregated neighborhoods. The NAACP and the Hollman class contended the Met Council had violated the federal Fair Housing Act by failing to encourage development of low-income housing in Twin Cities' suburbs, as well as by approving funding for suburban sewer and road projects and thus "accelerat[ing] the polarization of the metro area by income and race." The lawsuit was settled by consent decree in Hollman v. Cisneros, Civ. No. 4-92-712 (D. Minn. filed Apr. 21, 1995). In the Hollman decree, the Met Council agreed to undertake numerous complex responsibilities to help "achieve a metropolitan distribution of affordable

housing." Among these, the Met Council agreed to consider low-income housing distribution in its "decisions and recommendations regarding the . . . funding, construction, or approval of regional wastewater and transportation facilities." The parties agreed to submit periodic progress reports to the district court, and the district court retained jurisdiction to issue "such further orders as may be necessary or appropriate for the enforcement of this Decree."

Six months after the district court entered judgment in Hollman, the NAACP filed this lawsuit in state court "on behalf of a plaintiff class consisting of all students enrolled....in the Minneapolis public schools," which necessarily includes students who live in low-income housing and belong to the Hollman class. The plaintiffs (appellants before this court) claimed that because the Minneapolis public schools have disproportionate enrollments of poor and minority students, generating "negative effects" that "depress[] . . . educational achievement," Minneapolis public school students as a whole are being denied their right to receive an adequate education in violation of the Education and Equal Protection Clauses of the Minnesota Constitution. See Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993) (recognizing education as a fundamental right under the state constitution). The class-action complaint linked school enrollments to housing, alleging the defendants, including the Met Council, had "adopted . . . policies and practices that result in housing segregated by race and socioeconomic status

in the metropolitan area, . . . result[ing] in segregation . . . in the Minneapolis public schools." The plaintiffs objected to excessive spending on suburban infrastructure and to "transportation policies that . . . enable[] `white flight' to suburbs," and faulted the Met Council for failing "to require . . . suburban communities . . . to promote the development of low and moderate income housing. "In sustaining removal of, and then dismissing, the claims against the Met Council, the district court found the claims "focus exclusively on [the Met Council's] housing policies and practices, the subject of the Hollman lawsuit."

We consider first whether the district court properly exercised removal jurisdiction under the authority granted federal courts by the All Writs Act to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Although the All Writs Act is not an independent grant of jurisdiction, see White v. National Football League, 41 F.3d 402, 409 (8th Cir. 1994), the Act empowers a federal court "to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained," United States v. New York Tel. Co., 434 U.S. 159, 172 (1977). There is no dispute the district court properly obtained jurisdiction in Hollman. Under the terms of the Hollman decree, the district court retains jurisdiction to supervise compliance with the decree's provisions until the

year 2002. The decree sets forth the Met Council's agreement with the NAACP and the Hollman class that it will alter its policies and practices with respect to housing, wastewater facilities, and transportation in the Twin Cities' metropolitan area. Further, the Hollman decree includes a general release barring relitigation by any party of "any matters alleged in this action."

In this suit, the NAACP and the student class seek state injunctive relief against the Met Council concerning the very matters the Hollman decree governs. Although this class action is not removable under the federal removal statutes, the district court was confronted with a situation where parties subject to the district court's continuing jurisdiction under the Hollman decree--the NAACP and those student class members belonging to the Hollman class--were resorting to a state forum to relitigate settled and released claims. Faced with this circumstance, we believe the district court was warranted in authorizing removal from state court under the All Writs Act to protect the integrity of the federal consent decree entered in Hollman, see In re Agent Orange Prod. Liab. Litig., 996 F.2d 1425, 1431 (2d Cir. 1993), even though removal also brought into federal court those members of the student class who were not involved in Hollman, see New York Tel. Co., 434 U.S. at 174 (federal court's power under All Writs Act may encompass "persons who [were] not parties to the original action"). See also In re VMS Sec. Litig., 103 F.3d 1317, 1323-24 (7th Cir. 1996) (approving

removal under All Writs Act to enforce orders against relitigation and to guard integrity of earlier rulings over which district court retained jurisdiction); Sable v. General Motors Corp., 90 F.3d 171, 175 (6th Cir. 1996) (upholding removal under All Writs Act to protect federal consent decree from conflicting state orders); Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 863-65 (2d Cir. 1988) (holding removal proper under All Writs Act to protect integrity of federal consent decree and because issues raised in state suit were inseparable from relief provided by the decree); but see Hillman v. Webley, 115 F.3d 1461, 1469 (10th Cir. 1997) (holding All Writs Act may not be used as basis for removal, but district court may "enjoin parties before it from pursuing conflicting litigation in the state court"). Further, if we held these claims unremovable under the All Writs Act, any state-court orders affecting the Met Council inconsistent with the Hollman decree "would be subject to the injunctive powers of the federal court under the exception provisions of the Anti-Injunction Act." Yonkers, 858 F.2d at 864. Given the choices available to the district court, we think removal in this case better preserves state-federal relations than would later resort to an injunction because it spares the Hennepin County District Court from expending judicial resources to no avail. Because we conclude removal was proper under the All Writs Act, we need not determine whether removal was also warranted under the artful pleading doctrine.

Having decided the district court properly exercised

removal jurisdiction over claims asserted against the Met Council, we now turn to the district court's res judicata dismissal of those claims as precluded by Hollman. Our review is de novo, on both procedural and substantive grounds. See Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994) (appeal from dismissal under Rule 12(b)(6)); Poe v. John Deere Co., 695 F.2d 1103, 1105 (8th Cir. 1982) (federal law governs res judicata effect of an earlier federal judgment based on federal law). Under the doctrine of res judicata, or claim preclusion, "'a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.'" United States v. Gurley, 43 F.3d 1188, 1195 (8th Cir. 1994) (quoting Montana v. United States, 440 U.S. 147, 153 (1979)). Specifically, the earlier Hollman litigation precludes claims against the Met Council in this lawsuit if (1) the earlier suit resulted in a final judgment on the merits, (2) the earlier suit was based on proper jurisdiction, (3) both suits involved the same cause of action, and (4) both suits involved the same parties or their privies. See United States EPA v. City of Green Forest, Ark., 921 F.2d 1394, 1403 (8th Cir. 1990). A consent decree is a final judgment on the merits, see id., and no one challenges the jurisdiction of the Hollman court. Consequently, this appeal turns on whether this suit involves the same cause of action against the Met Council, and the same parties or their privies, as in Hollman.

Initially, the NAACP and the student class contend this suit and Hollman involve different causes of action

because Hollman claimed Fair Housing Act violations while this suit asserts violations of a right to an adequate education under the Minnesota Constitution. This argument misses the mark. The same cause of action framed in terms of a new legal theory is still the same cause of action. See Gurley, 43 F.3d at 1195. The claims against the Met Council in this suit involve the same cause of action as the claims against the Met Council in Hollman if both sets of claims "`arise[] out of the same nucleus of operative facts.'" Id. (quoting Lane v. Peterson, 899 F.2d 737, 742 (8th Cir. 1990)). "In the final analysis, the test [is] whether the wrong for which redress is sought is the same in both actions." Id. at 1196 (internal quotations omitted; emphasis in Gurley). As against the Met Council, this suit seeks what Hollman sought: to end the claimed segregative effect of the Met Council's policies and practices concerning housing and related infrastructure projects in the Twin Cities' metropolitan area. Despite the argument of the NAACP and the student class to the contrary, the fact their complaint alleges the Met Council failed "to coordinate school desegregation/integration efforts with the housing, social, economic, and infrastructure needs of the metropolitan area" does not affect our conclusion that, as far as the claims against the Met Council are concerned, this suit and Hollman involve the same cause of action. The "failure to coordinate" claim pertains to one of the state defendants, the Office of Desegregation/Integration in Minnesota's Department of Education, because that Office, not the Met

Council, shoulders the statutory responsibility for undertaking coordination efforts. See Minn. Stat. Ann. § 121.1601 (West Supp. 1997) (creating Desegregation Office and prescribing its duties). Otherwise, neither the plaintiffs' complaint nor their brief suggests the Met Council bears any responsibility for public education under Minnesota law.

Finally, we must determine whether this suit and Hollman involve the same parties or their privies. The NAACP was a party to Hollman, and it brought this suit on behalf of the student class. As defined in the plaintiffs' complaint, the student class necessarily includes students who live in low-income housing and belong to the Hollman class. We cannot determine the extent of class overlap, but it may be extensive because the plaintiffs' complaint states "the Minneapolis public schools have an extraordinary proportion of children living in poverty among their student populations," an assertion we must accept as true. See Coleman, 40 F.3d at 258. Given the two classes overlap but are not identical, the question we must answer is whether the student class in this case is in privity with the Hollman class.

Because the student class in this suit neither controlled the Hollman action nor are successors-in-interest to the Hollman class, the resolution of the privity issue depends on whether the student class was adequately represented in the earlier action by the Hollman class. See Tyus v. Schoemehl, 93 F.3d 449, 454 (8th Cir. 1996), cert. denied, 117 S. Ct. 1427 (1997). In this circuit, "`a person may be bound by a

judgment even though not a party if one of the parties to the suit is so closely aligned with [the person's] interests as to be [that person's] virtual representative.'" Id. (quoting Aerojet-General Corp. v. Askew, 511 F.2d 710, 719 (5th Cir. 1975)). Nonparty preclusion based on virtual representation involves an equitable, case-by-case inquiry, and there is no clear test for courts to apply. See id. at 455. Nevertheless, analyzing a particular case in light of the factors the court identified in Tyus enables us to "ensure that the relationship between the party to the original suit and the party sought to be precluded in the later suit is sufficiently close to justify preclusion." Id. at 454.

Although not enough by itself, identity of interests between the parties is essential. See id. at 455. This requirement is satisfied here. As against the Met Council, the interests of the Hollman class and the student class are virtually the same. The only difference is the Hollman class sued the Met Council to secure broader geographical distribution of low-income housing as an end in itself, while the student class seeks the same relief against the Met Council as a means to the end of improving education. Furthermore, the Hollman class adequately represented the interests it shares with the student class because the Hollman class had a powerful incentive to establish the segregative effects of the Met Council's housing policies and practices. See id. at 455-56. After all, the Hollman class could not prevail in its lawsuit against the Met Council without successfully

litigating the same kind of claims raised against the Met Council by the student class in this case. Although incentive to litigate, not results, is the key, see id. at 458, the Hollman plaintiffs secured commitments of more than $100 million to promote the spread of low-income housing in the Twin Cities' metropolitan area--which in turn, according to the plaintiffs' complaint in this suit, will improve educational achievement in the Minneapolis schools.

Because the memberships of the student and Hollman classes overlap, it is clear to us the parties in the two suits are not strangers to one another. Indeed, the student members of the Hollman class actually participated in that litigation. See id. at 455. Adding these considerations to the two classes' closely aligned interests, and the Hollman class's incentive to protect those interests in the earlier suit, we are satisfied that the members of the student class were adequately represented by, and thus are in privity with, the Hollman class. Accordingly, the district court properly dismissed the claims against the Met Council as precluded by Hollman.

We affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

◆

MINNEAPOLIS BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,ET AL.

v.

STATE OF MINNESOTA, ET AL.

◆

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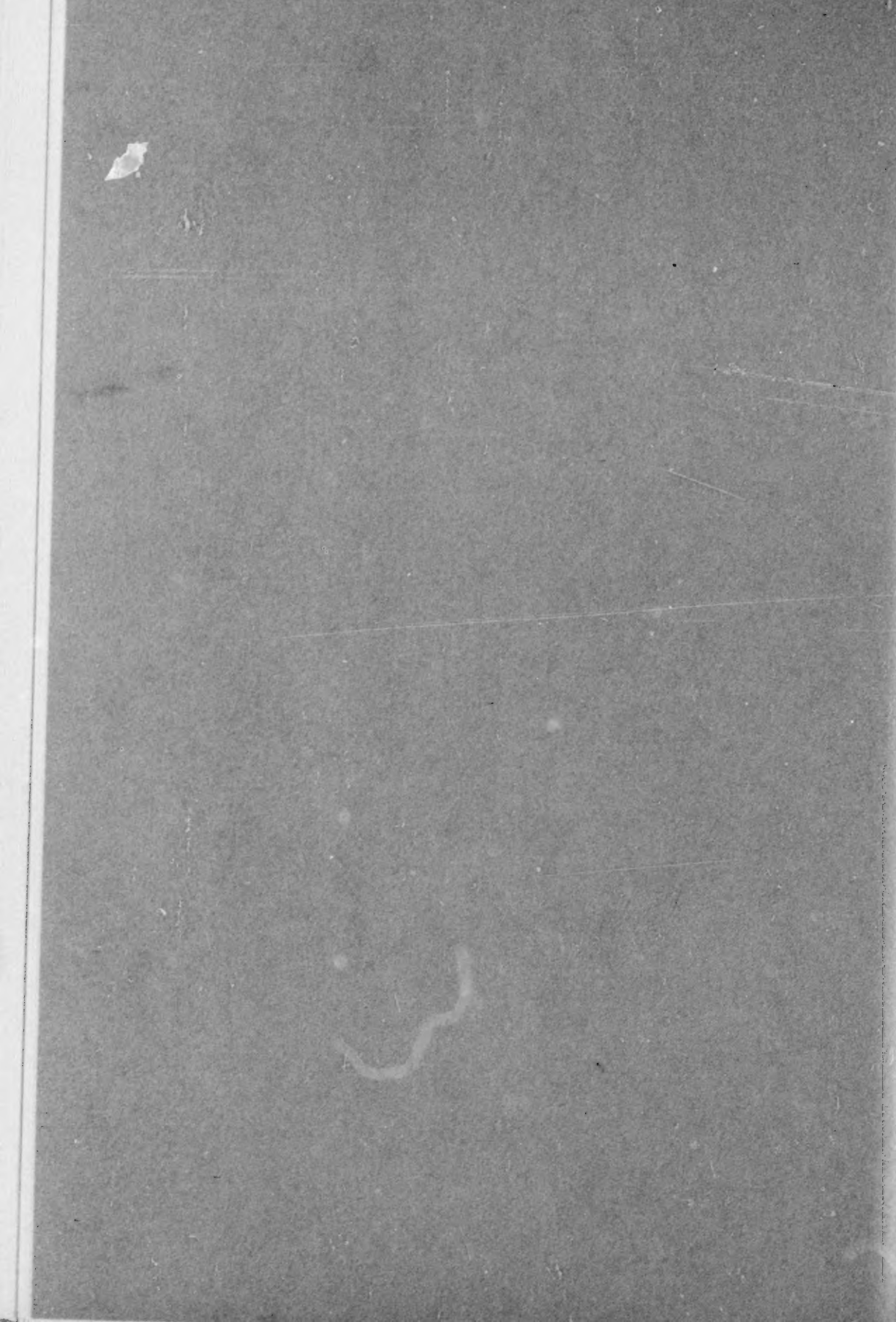

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Minneapolis Branch of the National Association for the Advancement of Colored People, et al., Plaintiffs,	)	Civ. File No. 3-95-968
v.	)	**MEMORANDUM AND ORDER**
State of Minnesota, et al., Defendants.	)	

This matter is before the Court upon Defendant Metropolitan Council's Motion to Dismiss. For the following reasons, the Court grants Metropolitan Council's motion.

I. BACKGROUND

In 1992, the Minneapolis Branch of the National Association for the Advancement of Colored People ("NAACP"), along with a class of low-income minority families who resided in specified Minneapolis public housing complexes, who held Section 8 vouchers, or who were on the waiting list to receive vouchers or public housing placement, brought suit against several federal and local agencies and governments. Hollman v. Cisneros, Civ. No. 4-92-712 (D. Minn.). The Metropolitan Council ("Met Council") was

added as a defendant to that lawsuit in 1994. The Hollman plaintiffs alleged that the defendants segregated minority public housing tenants by causing the majority of Minneapolis's public housing to be located in minority- and poverty-concentrated neighborhoods. They also alleged that Met Council's policies and practices contributed to this segregation. The Hollman case was settled on April 20, 1995. The Consent Decree that resulted from that settlement set out many obligations and commitments of Met Council to further the deconcentration of racially concentrated housing in Minneapolis.

On September 19, 1995, the NAACP and a class of Minneapolis schoolchildren, by their parents and next friends (collectively, "Plaintiffs"), filed this action in Hennepin County District Court. The lawsuit alleges, among other things, that the Minneapolis public schools have been and continue to be segregated on the basis of race and socioeconomic status as compared with neighboring and surrounding suburban school districts in violation of the Education and Equal Protection Clauses of the Minnesota Constitution. The Defendants to this action include twenty-one state officials and entities (collectively, "state defendants") and Met Council.

Plaintiffs allege three distinct claims against Met Council in their Complaint. First, they charge that Met Council, as an instrumentality of the State of Minnesota, has not provided them with the adequate education that is

guaranteed to them by the Minnesota Constitution. See generally Complaint. Second, Plaintiffs claim that Met Council has failed to satisfy its statutory duty to consult periodically with the Office of Desegregation/Integration of the Department of Education to coordinate school desegregation/integration efforts with the housing, social, economic, and infrastructure needs of the metropolitan area. See Complaint, ¶ 36(c). Finally, Plaintiffs allege that the segregation of the Minneapolis public schools is the result, in part, of Met Council's housing policies and practices. See Complaint, ¶ 36(d) ("Defendants have adopted, implemented, and permitted policies and practices that result in housing segregated by race and socioeconomic status in the metropolitan area, and thereby result in segregation by race and socioeconomic status in the Minneapolis public schools.").

Met Council removed the case to federal court on October 19, 1995, and in response, Plaintiffs moved to remand all defendants pursuant to 28 U.S.C. § 1447(c). Met Council opposed the motion as it pertained to Met Council only; it did not oppose remanding the claims against the state defendants. In an Order dated December 15, 1995, which was supplemented by a second Memorandum and Order dated February 5, 1996, the Court granted Plaintiffs' motion to remand with respect to the state defendants and denied it with respect to all claims against Met Council. The Court found that because Plaintiffs' claims against Met Council were

virtually identical to the claims against Met Council in Hollman and thus were truly federal in nature, removal was proper. Plaintiffs filed a petition with the Eighth Circuit for a writ of mandamus ordering this Court to remand the entire action to Hennepin County District Court due to a lack of subject matter jurisdiction. The Eighth Circuit denied Plaintiffs' petition on March 4, 1996, and Met Council filed this motion to dismiss shortly thereafter.

II. DISCUSSION

For the purposes of Met Council's Motion to Dismiss, the Court takes all facts alleged in Plaintiffs' Complaint as true. Westcott v. Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990). Further, the Court must construe the allegations in the Complaint and reasonable inferences arising from the Complaint favorably to Plaintiffs. Morton v. Becker, 793 F.2d 185, 187 (8th Cir. 1986). A motion to dismiss will be granted only if "it appears beyond doubt that the Plaintiff can prove no set of facts which would entitle him to relief." Id.; see also Conley v. Gibson, 355 U.S. 41, 45 - 46 (1957). The Court applies these standards in the following discussion.

Met Council moves to dismiss Plaintiffs' claims against it based on the doctrine of res judicata. In the alternative, Met Council argues that some of the Plaintiffs lack standing to pursue this action or that the Court should stay these proceedings to avoid interference with the Hollman Consent Decree.

Met Council contends that Plaintiffs' claim against it

in this case is precluded by the consent decree that resolved the Hollman litigation. For the doctrine of res judicata to bar a later claim, four requirements must be met: (1) the first suit must have resulted in a final judgment on the merits; (2) the first suit must have been based on proper jurisdiction; (3) both suits must involve the same cause of action; and (4) both suits must involve the same parties or parties in privity. United States Environmental Protection Agency v. Green Forest, 921 F.2d 1394, 1403 (8th Cir. 1990) (quoting Lovell v. Mixon, 719 F.2d 1373, 1376 (8th Cir. 1983)), cert. denied, 502 U.S. 956 (1991). Because a consent decree constitutes a final judgment on the merits, see Green Forest, 921 F.2d at 1404, and because the federal district court had jurisdiction over Hollman pursuant to 28 U.S.C. §§ 1331, 1343, and 1361, the parties agree that the first two requirements of the Green Forest test have been satisfied. The parties sharply disagree, however, about whether the latter two requirements have been met.

A. This Case and the Hollman Litigation Involve the Same Cause of Action.

For the claims against Met Council in this case to be barred by the res judicata doctrine, they must be substantially the same as the claims against Met Council in Hollman. See, e.g., Brzostowski v. Laidlaw Waste Sys., Inc., 49 F.3d 337, 339 (7th Cir. 1995). Two lawsuits constitute the same cause of action if they arise out of the same nucleus of operative facts. United States v. Gurley, 43 F.3d 1188, 1195 (8th Cir.

1994), cert. denied, 116 S.Ct. 73 (1995); Lane v. Peterson, 899 f.2d 737, 742 (8th Cir.), cert denied, 498 U.S. 823 (1990). Res judicata applies even if the plaintiff attempts to relitigate the same claim under a different legal theory. Gurley, 43 F.3d at 1195.

1. This Court previously has found that the claims are "virtually identical."

This Court has already determined that the claims against Met Council in this case and in Hollman are substantially the same.[1] In its February 5, 1996 Memorandum and Order denying Plaintiffs' motion to remand the claims against Met Council, the Court found that "the claims made against Met Council in the present lawsuit . . . are virtually identical to the claims against Met Council in Hollman." (Mem. and Order at 5 (emphasis in original).) This finding

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[1]The Court notes with displeasure Plaintiffs' attempts to obscure the plain meaning of the Court's comments at the hearing of their remand motion. In attempting to show that the Court did not definitively find that Plaintiffs' claims here and in Hollman were "virtually identical," Plaintiffs quote in their brief sentences from two unrelated transcript paragraphs in a way that misrepresents the Court's meaning. (Pls.' Mem. in Opp. to Mot. to Dismiss at 8-9.) The Court's statement, "That's too far," did not refer to its conclusion that the claims were virtually identical, but rather to the Court's characterization of the claims against Met Council as a "real estate case." (Tr. at 32.) Plaintiffs compound their error by ignoring the court's supplemental written Memorandum and Order, which was entered two weeks before Plaintiffs submitted their brief.

was made in the context of applying the standard set out in In re Agent Orange Products Liability Litigation, 996 F.2d 1425, 1431 (2d Cir. 1993), cert. denied sub nom. Ivy v. Diamond Shamrock Chemicals Corp., 114 S. Ct. 1125 (1994), and Travelers Indemnity Co. v. Sarkisian, 794 F.2d 754, 760 (2d Cir.), cert. denied, 479 U.S. 885 (1986). The Second Circuit's two-prong standard, which the Court used to determine whether to grant Plaintiffs' motion to remand, required the Court to decide whether the elements of the state law claim under consideration were virtually identical to those of a previously litigated federal claim. Agent Orange, 966 F.2d at 760 (citing Sarkisian, 794 F.2d at 1431). Based on the faces of the two complaints, the Court held that the claims were virtually identical. (Mem. and Order at 5.)

Absent a clear and convincing reason to reexamine a prior ruling, the law of the case doctrine mandates that a court not reconsider its own decision made at an earlier stage in the proceedings. Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (1988) ("[A]s a rule courts should be loathe [to revisit their prior decisions] in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'") (quoting Arizona v. California, 460 U.S. 605, 618 n.8 (1983)); United States v. Chicago, 853 F.2d 572, 576 (7th Cir. 1988); see also United States v. Bartsch, 69 F.3d 864, 866 (8th Cir. 1995) ("The law of the case doctrine prevents the relitigation of a settled issue in a case and requires courts to

adhere to decisions made in earlier proceedings in order to ensure uniformity of decisions, protect the expectations of the parties, and promote judicial economy."). Plaintiffs nowhere assert that the Court's finding of identity between the claims against Met Council in the two litigations was clearly erroneous, nor do they argue that the standard for finding claims identical is different when considering a motion to remand as opposed to a motion to dismiss based on res judicata. Rather, Plaintiffs argue that the Court never expressly made such a finding and that the Court's comments at the hearing on this matter were mere dicta or commentary instead of binding determinations. (Pls.' Mem. in Opp. to Mot. to Dismiss at 8 - 11.)

Plaintiffs' position is contrary to the clear import of the Court's February 5, 1995 Memorandum and Order. That the Court provided an alternative rationale for its decision under the all Writs Act, (Mem. and Order at 5 - 6), does not take away from its explicit holding that the two sets of claims are virtually identical. Adding further support to the court's finding, the Eighth Circuit refused to grant Plaintiffs' petition for a writ of mandamus, thus indicating that the Court's decision was not clearly erroneous. Pursuant to the law of the case doctrine, the third prong of the Green Forest test has been satisfied by this Court's prior ruling.

2. On reconsideration, the Court would find the claims to be the same.

Even if the Court were to reconsider its prior decision,

however, it would reach the same conclusion. In their opposition brief, Plaintiffs delineate three distinct claims that they allege are different from the claims brought against Met Council in Hollman. (Pls.' Mem. in Opp. at 19 - 20). First, they charge that Met Council, as an instrumentality of the State of Minnesota, has not provided them with the adequate education that is guaranteed to them by the Minnesota Constitution. Second, Plaintiffs claim that Met Council has failed to satisfy its statutory duty to consult periodically with the Office of Desegregation/Integration ("ODI") of the Department of Education to coordinate school desegregation/integration efforts with the housing, social, economic, and infrastructure needs of the metropolitan area. Finally, Plaintiffs allege that the segregation of the Minneapolis public schools is the result, in part, of Met Council's housing policies and practices.

Plaintiffs first claim that Met Council has failed to provide them with an adequate education. This claim is legally baseless. Plaintiffs fail to point to any authority that places upon Met Council the constitutional duty to provide Minneapolis schoolchildren with an adequate public education. As Met Council argues, imposing a constitutional duty on a governmental body simply because it is an "instrumentality of the state" would produce an absurd situation in which the Metropolitan Airport Commission would be responsible for providing Minnesota citizens with an adequate education. The Minnesota Constitution expressly

imposes the duty to establish a system of public schools upon the legislature. Minn. Const. art. XIII, § 1. Without a similar express delegation of legislative authority, Met Council does not have responsibility for or control over the provision of public education. See, e.g., Blaine v. Independent Sch. Dist. No. 12, 138 N.W.2d 32, 41 (Minn. 1965) (finding that public education is within the control of school districts, not municipalities). Met Council has no duty under the Minnesota Constitution to provide Plaintiffs with an adequate public education, so while Plaintiffs' first allegation is not the same as the claims in Hollman, it fails to state a claim upon which relief can be granted.

Plaintiffs' second claim, that Met Council failed to consult with the ODI concerning education as required by Section 121.1601 of the Minnesota Statutes, is similarly groundless. Section 121.1601 creates the ODI and defines its duties; it does not proscribe the duties of Met Council. One of the ODI's duties is to "periodically consult with the metropolitan council to coordinate school desegregation/ integration efforts with the housing, social, economic, and infrastructure needs of the metropolitan area." Minn. Stat. § 121.1601, subd. 1(c). The statutory duty that Plaintiffs accuse Met Council of neglecting is a duty that in reality belongs to the ODI. Section 121.1601 does not impose education-related duties on Met Council. Met Council's obligations under this statute are, at the most, to respond to the ODI's efforts to coordinate desegregation with the housing, social, economic,

and infrastructure issues that fall within Met Council's jurisdiction. To the extent that Plaintiffs' second allegation states a claim at all, it is a housing-type claim substantially similar to the claims made against Met Council by the Hollman plaintiffs.

Plaintiffs' third claim challenges all of Met Council's housing practices that confine poor and minority children to the Minneapolis public schools, thus overburdening the Minneapolis school system and preventing an adequate education for all Minneapolis students. Despite Plaintiffs' attempts to narrow the issues litigated in Hollman, it is clear from a reading of both complaints that in each case, the plaintiffs attack Met Council's metropolitan-area-wide housing policies and practices, which they allege contribute to the segregation of the metropolitan area by both race and socioeconomic status. Met Council quotes several excerpts from the Hollman complaint that cite socioeconomic segregation as well as racial segregation as the impetus for that lawsuit. (Met Council's Reply Mem. at 8 - 9.) The quoted segments also highlight the Hollman plaintiffs' metropolitan-area-wide focus. Id. The housing-related claims brought against Met Council in the instant case are virtually identical to the claims against Met Council in Hollman. (See Met Council's Mem. in Opp. to Pls.' Motion to Remand at 11 - 13).

Plaintiffs argue that even if the Court determines that their claims against Met Council based on conduct before the

Hollman Consent Decree are barred by res judicata, any and all subsequent actions and inactions by Met Council "are still fair game." Plaintiffs claim to allege in their Complaint that Met Council has "continued to violate its constitutional and statutory obligations to facilitate the adequate education of Minneapolis schoolchildren," (Pls.' Mem. in Opp. at 21), yet they do not identify in their Complaint one act or omission that occurred after the entry of the Hollman Consent Decree. Plaintiffs' blanket allegations are insufficient to state a claim against Met Council based on actions or inactions that occurred after the entry of the Consent Decree.

None of the three distinct charges alleged by Plaintiffs against Met Council present viable claims that are distinct from claims against Met Council that were raised and settled in Hollman. Therefore, the Court adheres to its original finding that the claims are virtually identical, thus satisfying the third prong of the Green Forest test.

B. This Case and the Hollman Litigation Involve the Same Parties or Parties in Privity.

1. Identical Parties

For this Court to dismiss the claims against Met Council on res judicata grounds, the Plaintiffs in this case must be identical to the Hollman plaintiffs or in privity with the Hollman plaintiffs. As Plaintiffs concede, the NAACP is a named plaintiff in both cases and thus is an identical party for purposes of res judicata. In addition, there is, necessarily,

significant overlap between the class in the Hollman litigation and the putative class in this case. Despite Plaintiffs' protestations to the contrary, it is obvious to the Court that many members of the Hollman class -- minority families who reside in public housing, receive Section 8 vouchers, or are on waiting lists for either type of housing -- are also school-age children who attend the Minneapolis public schools and thus are members of the putative class in the instant case.[2] All Minneapolis schoolchildren who fall into the Hollman class definition are identical parties for res judicata purposes.

2. Parties in Privity

The plaintiffs in the instant case who are not residents of or on waiting lists for low-income housing cannot be bound by the Hollman Consent Decree unless they are in privity with the Hollman plaintiffs. See Sondel v. Northwest Airlines, Inc., 56 F.3d 934, 938 (8th Cir. 1995). A nonparty to a prior adjudication is in privity with a party to that litigation if the nonparty (1) controlled the original action, (2)

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[2]Plaintiffs' statement, at page 11 of their brief, that "there is no demonstration that the class of Minneapolis schoolchildren has any members in the Hollman plaintiff class" is utterly disingenuous. On the first page of that same brief, Plaintiffs state that the class in this case "consists largely of strangers to the Hollman litigation." Furthermore, in mandamus proceedings before the Eighth Circuit, the Hollman plaintiffs asserted that "many of the Hollman class members are likely to be part of the NAACP class." (Conditionally-Filed Amicus Curiae Br. in Supp. of Pet. for Writ of Mandamus at 4.)

was a successor-in-interest to a party to the original action, or (3) has interests that were represented by a party to the original action. Id. Since Met Council does not argue that Plaintiffs controlled the Hollman litigation or that Plaintiffs are successors-in-interest to the Hollman plaintiffs, privity exists only if the Hollman plaintiffs adequately represented these Plaintiffs in the earlier litigation. The Court must examine the relationship between these Plaintiffs and the Hollman plaintiffs and their respective interests to decide whether privity exists. Id.

The Eighth Circuit recently considered the issue of privity in Sondel, a case with a procedural posture very similar to this case.[3] In Sondel, four individual piaintiffs brought claims in state court under the Minnesota Human Rights Act at about the same time that they brought parallel claims in federal court as certified class representatives in a Title VII class action. The state court tried and dismissed the individual claims, and the defendant moved for summary

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[3]Plaintiffs object to Met Council's reliance on Sondel because Sondel involved the preclusive effect of a state court decision, not a federal court decision as in the instant case. Thus, the Eighth Circuit in Sondel applied Minnesota's law of res judicata, whereas this Court must apply federal res judicata law. See Meza v. General Battery Corp., 908 F.2d 1262, 1265 (5th Cir. 1990). Met Council's, and this Court's, reliance on Sondel is appropriate because there is no substantive difference between Minnesota's law of res judicata and federal res judicata law. Compare Sondel, 56 F.3d at 938 - 41, with Meza, 908 F.2d at 1266 - 73.

judgment in federal court based on res judicata. Both the district court and the Eighth Circuit found that because the federal class was in privity with the individual state court plaintiffs, res judicata barred the federal action. Id. at 937, 940. The Eighth Circuit applied a four-part test in deciding whether privity existed; the court asked whether (1) the plaintiffs in the first action were adequately represented; (2) the interests of the two groups of plaintiffs were the same; (3) the substantive rights asserted were the same; and (4) the character of relief granted in the first action would not have changed if the plaintiffs in the second action had been actual parties to the original action. Id. at 939 (citing Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist., 750 F.2d 731, 741 (9th Cir. 1984), cert. denied, 474 U.S. 919 (1985)).

The Eighth Circuit found that all four factors were satisfied in Sondel, and this Court finds that they are satisfied in the instant case as well. First, Plaintiffs do not dispute that the Hollman plaintiffs were adequately represented. The favorable settlement reached in Hollman speaks to the quality of the plaintiffs' representation. See White v. National Football League, 41 F.3d 402, 408 (8th Cir. 1994), cert. denied sub nom. Jones v. National Football League, 115 S. Ct. 2569 (1995). Second, the interests of both groups of plaintiffs are the same. Despite Plaintiffs' repeated attempts to narrow the issues of Hollman until they bear little resemblance to the language in that case's complaint, plaintiffs in both cases object to the policies and practices of

Met Council that they claim have produced housing in the metropolitan area that is segregated by race and socioeconomic class. As discussed above, Plaintiffs' efforts to distinguish the instant case by adding the "distinct claims" of failure to provide Minneapolis schoolchildren with an adequate education and failure to consult with the ODI fail because Met Council has no such statutory or constitutional duties. Third, plaintiffs in both cases seek to assert their substantive right with respect to Met Council to be free from the alleged segregative policies and practices.

Finally, if Plaintiffs had been actual parties in Hollman, the character of the relief granted in Hollman would not have been different. Both groups of plaintiffs seek the desegregation of housing in the metropolitan area, particularly Minneapolis. The only distinction between the two cases is that Plaintiffs in the instant case desire desegregated housing as an essential element of their quest for an adequate education for all Minneapolis schoolchildren. Given the Court's disallowance of two of Plaintiffs' three distinct claims, the relief sought in this case as to Met Council is very similar to that secured by the Hollman Consent Decree. Plaintiffs acknowledged some degree of similarity earlier in this litigation: "Steps taken to comply with the Hollman decree by the Metropolitan Council, if at all related to the instant case, will most likely represent a step toward meeting the requirements of any contemplated remedy in the instant case." (Reply Mem. of Pls. in Supp. of Mot. to Remand at 10

(emphasis in original).) Because all four requirements set forth in Sondel are satisfied, Plaintiffs' interests as to Met Council were adequately represented by the Hollman plaintiffs.

The Eighth Circuit, acknowledging that coincidental interests alone cannot establish privity, also considered in Sondel whether a "special relationship" existed between the two sets of plaintiffs. Sondel, 56 F.3d at 940. The court found a special relationship there because the individual plaintiffs in the state court claim represented the class in the federal class action suit. Id. The instant case involves similar dynamics between the NAACP and the remaining plaintiffs. The NAACP, a named plaintiff in Hollman, is the putative class representative in this action, which involves the same housing claims against Met Council as Hollman. As putative class representative, the NAACP necessarily shares the same interests as all class members. See Fed. R. Civ. P. 23(a). Because the putative class's interests as to Met Council are the same interests that the NAACP, and others, pursued in Hollman, the putative class members were "virtually represented" by the Hollman plaintiffs and thus are bound by the Hollman Consent Decree.

Two other federal appeals court decisions, which the Eighth Circuit cited in Sondel, are instructive on the issue of privity as well. In NAACP v. Hunt, the Eleventh Circuit found that privity existed between an individual plaintiff in an earlier federal claim and a group of individuals and the

NAACP in a subsequent federal claim. 891 F.2d 1555, 1560 - 61 (11th Cir. 1990). The original plaintiff was an Alabama state legislator and NAACP member who unsuccessfully challenged Alabama's flying of the confederate flag at the state capitol. Several years later, the NAACP and a group of Alabama legislators who were also NAACP members filed a similar suit. As in the instant case, the plaintiff in the original action was also a plaintiff in the second suit. In finding that privity existed and res judicata barred the second action, the Eleventh Circuit held that the interests of the original plaintiff were so closely aligned with those of the NAACP and the other plaintiffs that he acted as their virtual representative. Id. at 1561.

The Ninth Circuit took a similar position on privity in Los Angeles Branch NAACP v. Los Angeles Unified School District. 750 F.2d 731 (9th Cir. 1984), cert. denied, 474 U.S. 919 (1985). In that case, a group of minority students asserted a desegregation claim against the Los Angeles school district in state court, eventually resulting in a desegregation plan. While appeals of the original decision were pending, the NAACP filed a federal claim on behalf of minority students in the same school district. As in this case, the second class of plaintiffs included some, but not all, of the class members from the original action as well as individuals who had not been involved in the first case. Despite the fact that some of the plaintiffs had not been actual parties to the earlier litigation, the Ninth Circuit found that their interests

were virtually represented by the plaintiffs in the first litigation and gave preclusive effect to the state court decision. Id. at 741 - 42. Similarly, Plaintiffs here were virtually represented by the Hollman plaintiffs.

Plaintiffs' arguments against a finding of privity fail to overcome the similarities between this case and Sondel, Hunt, and Los Angeles NAACP. Plaintiffs' refutations of Met Council's privity argument focus on those two claims that the Court has already found to be inappropriate as to Met Council; Plaintiffs do not deny that their interests as to the housing element of their lawsuit is the same as in Hollman. Moreover, the only Eighth Circuit case cited by Plaintiffs in support of their position is easily distinguishable. The court in Duncan v. Clements found that no privity existed between the State of Missouri as a party to Duncan's criminal prosecution and individual police officers in a later civil rights claim. 744 F.2d 48, 52 (8th Cir. 1984). Although both parties needed to prove that probable cause existed for an arrest and subsequent search and seizure to succeed in their respective cases, the court held that the State's interests in a criminal proceeding are not identical to those of an individual officer because the officer's personal interests are not at stake in the criminal proceeding. Id. The situation in Duncan differs sharply from the instant case, where the Hollman plaintiffs and Plaintiffs in the instant case share an identical interest in the outcome of the housing issues litigated in Hollman. The fourth prong of the Green Tree test is satisfied.

III. CONCLUSION

Because Met Council has proven all four elements of the test set forth in United States Environmental Protection Agency v. Green Tree, Plaintiffs' claims as to Met Council are barred by the doctrine of res judicata. Plaintiffs' allegations against Met Council constitute, at their core, housing claims identical to those alleged and resolved in the earlier case of Hollman v. Cisneros. Met Council's Motion to Dismiss is granted on that ground. The Court therefore need not consider Met Council's alternative argument based on lack of standing or its request for a stay of this action pending the expiration of the Hollman Consent Decree.

Accordingly, **IT IS HEREBY ORDERED** THAT:

1. Defendant Metropolitan Council's Motion to Dismiss (Clerk Doc. No. 18) is GRANTED; and

2. The Complaint is DISMISSED with respect to Defendant Metropolitan Council.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: /s/ July 15, 1996.

/s/ Paul A. Magnuson
Paul A. Magnuson
United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Minneapolis Branch of the National Association for the Advancement of Colored People, et al., Plaintiffs,	)	Civ. File No. 3-95-968
v.	)	**MEMORANDUM**
State of Minnesota, et al., Defendants.	)	**AND ORDER**

I. INTRODUCTION

This matter is before the Court upon Plaintiffs' Motion to Remand and for Payment of Costs. For the following reasons, the Court determines that Plaintiffs' motion should be granted in part and denied in part.

II. BACKGROUND

In 1992, the Minneapolis Branch of the National Association for the Advancement of Colored People ("NAACP"), along with a class of low-income minority families who resided in specified Minneapolis public housing complexes, held Section 8 vouchers, or were on the waiting list to receive such vouchers, brought suit against several federal and local agencies and governments. Hollman v. Cisneros, Civ. No. 4-92-712 (D. Minn.). The Metropolitan

Council ("Met Council") was added as a defendant to that lawsuit in 1994. The Hollman plaintiffs alleged that the defendants segregated minority public housing tenants by causing the majority of Minneapolis's public housing to be located in minority- and poverty-concentrated neighborhoods. They also alleged that Met Council's policies and practices contributed to this segregation. The Hollman case was settled on April 20, 1995. The Consent Decree that resulted from that settlement set out many obligations and commitments of Met Council to further the deconcentration of racially concentrated housing in Minneapolis.

On September 19, 1995, the NAACP and a class of Minneapolis school children, by their parents and next friends (collectively "Plaintiffs"), filed this action in Hennepin County District Court. The lawsuit alleges, among other things, that the Minneapolis public schools have been and continue to be segregated on the basis of race and socioeconomic status as compared with neighboring and surrounding suburban school districts in violation of the Education and Equal Protection Clauses of the Minnesota Constitution. The Defendants to this action include twenty-one state officials and entities (collectively "state defendants") and Met Council.

In their Complaint, Plaintiffs allege that the segregation of the Minneapolis public schools is the result, in part, of Met Council's housing policies and practices. See Complaint, ¶ 36(d) ("Defendants have adopted, implemented,

and permitted policies and practices that result in housing segregated by race and socioeconomic status in the metropolitan area, and thereby result in segregation by race and socioeconomic status in the Minneapolis public schools."). The Complaint also states that Met Council "periodically consults with the Office of Desegregation/Integration of the Department of Education to coordinate school desegregation/integration efforts with the housing, social, economic, and infrastructure needs of the metropolitan area." Complaint, ¶ 19.

Met Council removed the case to federal court on October 19, 1995 by filing a notice of removal. Plaintiffs move to remand all defendants in this case pursuant to 28 U.S.C. § 1447(c). The state defendants do not oppose Plaintiffs' motion. Met Council opposes the motion as it pertains to Met Council only; it does not oppose remanding the claims against the state defendants. Under 28 U.S.C. § 1441(c), the Court may retain jurisdiction over some claims while remanding all matters in which state law predominates.

III. DISCUSSION

Ordinarily, a case filed in state court may not be removed to federal court under 28 U.S.C. § 1441(b) if federal jurisdiction is not apparent on the face of the well-pleaded complaint. Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987). With respect to Plaintiffs' claims against the state defendants, which are based solely on violations of the Minnesota Constitution, the well-pleaded complaint rule

precludes removal. If, however, claims in a complaint are truly federal in nature and have been disguised by the plaintiff's artful pleading, removal may be appropriate.

The so-called artful pleading doctrine clearly applies in cases where federal law completely preempts the state law relied upon, leaving the plaintiff with only federal claims. See Caterpillar, 482 U.S. at 392 - 93; Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 23 (1983). A more difficult question arises when state law has not been preempted but the state claims have "sufficient federal character" to be removed to federal court. See Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 397 n.2 (1981). The Eighth Circuit has not ruled on this issue, and the circuits that have ruled are in disagreement as to whether removal is appropriate in this situation.

The Second Circuit, in both Travelers Indemnity Co. v. Sarkisian and In re Agent Orange Product Liability Litigation, has provided a helpful standard. Under these cases, a state claim is subject to removal under the artful pleading doctrine if "(1) the plaintiff previously had elected to proceed in federal court on a claim expressly grounded on federal law and (2) the elements of the subsequent state law claim are virtually identical to those of the claim previously made." Agent Orange, 996 F2d 1425, 1431 (2d Cir. 1993) (citing Sarkisian, 794 F.2d 754, 760 (2d Cir. 1986)). In the earlier Hollman litigation, the NAACP and a group of public-housing residents and people on the Section 8 waiting list

brought suit against a group of defendants, including Met Council, alleging violations of the federal Fair Housing Act. Plaintiffs argue that the plaintiffs in Hollman were not identical to themselves; in their pleadings, Plaintiffs construe the two groups as narrowly as possible to highlight their differences. However, both groups of plaintiffs consist of low-income and minority children and their families residing in Minneapolis, not simply those residents of the specific housing complexes listed in Plaintiffs' pleadings. There is sufficient overlap to meet the first prong of the Agent Orange / Sarkisian test.

Met Council has met the second prong of this test as well. As documented in Met Council's brief in this matter, the claims made against Met Council in the present lawsuit (as opposed to those made against the state defendants) are virtually identical to the claims against Met Council in Hollman. See Metropolitan Council's Memorandum in Opposition to Plaintiffs' Motion to Remand and for Payment of Costs, at 11 - 13. Although Plaintiffs' claims against the other defendants in the instant case focus on education, their claims against Met Council focus exclusively on its housing policies and practices, the subject of the Hollman lawsuit. The only direct link between Met Council and segregated public schools cited by Plaintiffs in their Complaint is Met Council's periodic consultation with the Office of Desegregation/Integration. While the relief sought generally in this case is the State's provision of an adequate education

to Minneapolis school children, the relief sought from Met Council involves the desegregation of housing in the metropolitan area, as in Hollman. Plaintiffs' assertions to the contrary seem disingenuous. Therefore, Plaintiffs' claims against Met Council are of sufficient federal character to warrant removal under Agent Orange and Sarkisian.

Even if the artful pleading doctrine does not apply, Met Council is entitled to remove Plaintiffs' claims against it under the All Writs Act, which authorizes courts to issues writs necessary and appropriate to aid its jurisdiction. 28 U.S.C. § 1651. Federal courts may only use their authority under the Act in "exceptional circumstances." They may issue such commands under the Act as necessary to "effectuate and prevent the frustration of orders [they have] previously issued in [their] exercise of jurisdiction." United States v. New York Tel. Co., 434 U.S. 159, 172 (1977). The Second Circuit has held that a federal court may use this authority to remove an otherwise unremovable state court case in order to protect its earlier orders. In re Agent Orange Product Liability Litigation, 996 F.2d 1425, 1431 (2d Cir. 1993); Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 863 - 65 (2d Cir. 1988). Here, any remedy pertaining to Met Council granted by the state court will necessarily overlap with the consent decree in place in Hollman, despite Plaintiffs' claim that the remedies sought in the two cases pertaining to Met Council are different. Even if a state court remedy does not explicitly contradict the Hollman decree,

federal court jurisdiction over the Met Council claims is "necessary to protect the integrity of the Consent Decree. Yonkers Racing Corp., 858 F.2d at 865.

Plaintiffs also ask the Court to award them their costs and attorneys' fees in securing remand as provided by 28 U.S.C. § 1447(c). Because the Court finds that removal is appropriate in this case as to defendant Met Council, Plaintiffs are not entitled to costs and attorneys' fees.

IV. CONCLUSION

This Court has removal jurisdiction over Plaintiffs' claims against Met Council under 28 U.S.C. § 1441 or, in the alternative, under 28 U.S.C. § 1651. Therefore, Plaintiffs' Motion to Remand must be denied.

Accordingly, **IT IS HEREBY ORDERED** THAT:

1. Plaintiffs' Motion to Remand (Clerk Doc. No.3) is GRANTED with respect to all claims against Defendants State of Minnesota; Arne H. Carlson, Governor, State of Minnesota; Minnesota State Board of Education; Jeanne Kling (President), George Jernberg (Vice President), Robert J. Brown, Erling Johnson, Thomas Lindquist, Tom Peacock, Shamus Roller, Nedra Wicks, Members of the Minnesota State Board of Education; Minnesota State Department of Education; Ann Schluter, Commissioner of Education; Minnesota Senate; Allan H. Spear, President of the Minnesota Senate; Minnesota House of Representatives;

Irv Anderson, Speaker of the Minnesota House of Representatives; Robert Miller, Director of the Office of Desegregation/Integration of the Minnesota Department of Education; Michael A. McGrath, State Treasurer; Judith Dutcher, State Auditor; and Hubert H. Humphrey III, Minnesota Attorney General;

2. Plaintiffs' Motion to Remand (Clerk Doc. No. 3) is DENIED with respect to all claims against Defendant Metropolitan Council; and

3. Plaintiffs' Motion for Payment of Costs and Fees (Clerk Doc. No. 3) is DENIED.

Dated: /s/ February 5, 1996

/s/ Paul A. Magnuson
Paul A. Magnuson
United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Minneapolis Branch of the National Association for the Advancement of Colored People, on behalf of themselves and all others similarly situated; Brystan Hill, by His Next Friend Lisa Hill; Sophie Krahnke, by Her Next Friends Steven Krahnke and Jane McLeod; Miquel McElroy, by His Next Friend Annie Pearl McElroy; Gregory McFraland, by his Next Friend Linda McFarland; Solveig and Anna Mebust by their Next Friends Bruce Lynn Mebust and Kirsten Ann Scribner Mebust; and Diamond Porter, by His Next Friend Jamie Porter,

Court File:_____

Plaintiffs,

v.

NOTICE OF REMOVAL

State of Minnesota; Arne H. Carlson, Governor, State of Minnesota; Minnesota State Board of Education;

Jeanne Kling (President), George Jernberg (Vice-President), Robert J. Brown, Erling Johnson, Thomas Lindquist, Tom Peacock, Shamus Roller, Nedra Wicks, Members of the Minnesota State Board of Education; Minnesota State Department of Education; Ann Schluter, Commissioner of Education; Minnesota Senate; Allan H. Spear, President of the Minnesota Senate; Minnesota House of Representatives; Irv Anderson, Speaker of the Minnesota House of Representatives; Robert Miller, Director of the Office of Desegregation/Integration of the Minnesota Department of Education; Michael A. McGrath, State Treasurer; Judith Dutcher, State Auditor; Hubert H. Humphrey III, Minnesota Attorney General; and The Metropolitan Council, a Public Body Corporate and Politic,

Defendants.

Defendant Metropolitan Council submits this notice of removal pursuant to 28 U.S.C. §§ 1441, 1446 and 1651. Removal is proper because, pursuant to 28 U.S.C. § 1331, the Federal District Courts have original jurisdiction of all civil actions which arise under the Constitution, laws, or treaties of the United States. Further, pursuant to 28 U.S.C. § 1367, the Federal District Courts have supplemental jurisdiction over all other claims that are so related to claims in the action with such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. In addition, pursuant to 28 U.S.C. § 1651, Federal District Courts may issue all writs necessary or appropriate in aid of their jurisdiction and agreeable to the usages and principles of law.

Here, plaintiffs' complaint, through artful pleading, appears to be grounded solely in state law; however, plaintiffs' separate and independent claim against the Metropolitan Council is, in fact, grounded in federal law and is an attempt by plaintiff NAACP and possibly other plaintiffs to avoid a prior binding federal consent decree in Hollman v. Cisneros, No. 4-92-712 (D. Minn. April 21, 1995) (consent decree). Further, this Court has supplemental jurisdiction over the related state claims of plaintiff NAACP and the other plaintiffs against the Metropolitan Council and the other defendants. Hence, removal is appropriate under 28 U.S.C. § 1441. In the alternative, removal is appropriate under the All Writs Act, 28 U.S.C. § 1651. Plaintiffs' claims against

the Metropolitan Council alleging that the Metropolitan Council has failed to promote metropolitan-wide integration of housing are virtually identical to claims and allegations made by plaintiff NAACP and others in Hollman. Compare NAACP Complaint ¶ 36(d), Exhibit A to Affidavit of Charles N. Nauen ("Nauen Aff."), and Hollman Second Amended Complaint ¶¶ 100-103, Nauen Aff. Exhibit B. These claims were settled and released in consideration for approximately $100 million in federal housing funds and other obligations intended to promote, among other things, deconcentration of racially concentrated family public housing projects in Minneapolis. Nauen Aff. Exhibit C at ¶ 3 (purpose of Decree) and ¶ 96 (release). The settlement was approved by the Honorable James M. Rosenbaum, District Court Judge, United States District Court for the District of Minnesota, in a Consent Decree filed on April 21, 1995. The Court expressly retained jurisdiction to issue any orders necessary or appropriate for the enforcement of the Consent Decree. Nauen Aff. Exhibit C at ¶ 107.

The All Writs Act permits a federal court to remove a state court action in order to effectuate and prevent the frustration of orders that the federal court previously has issued. In re Agent Orange Product Liability Litigation, 996 F.2d 1425, 1431 (2d Cir. 1993). Because plaintiffs' claims against the Metropolitan Council in this case are virtually identical to the claims asserted in Hollman, plaintiffs' state Court action might frustrate the implementation of the

Hollman Consent Decree. Under these circumstances, removal is an appropriate use of federal judicial power under 28 U.S.C. § 1651.

Accompanying this Notice is a true and correct copy of the Summons and Complaint filed by plaintiffs in the Minnesota District Court, County of Hennepin, Fourth Judicial District, as served upon the Metropolitan Council on September 19, 1995. Nauen Aff. Ex. A.

DATED: October 19, 1995

SCHATZ PAQUIN
LOCKRIDGE GRINDAL &
HOLSTEIN P.L.L.P.

By: /s/ Charles N. Nauen
Charles N. Nauen, #121216
William A. Gengler, #210626
Suite No. 2200
100 Washington Avenue South
Minneapolis, MN 55401
Telephone: (612) 339-6900

METROPOLITAN COUNCIL
Jay M. Heffern, #4331X
Mears Park Centre, 7th Floor
230 East Fifth Street
St. Paul, MN 55101-1634
Telephone: (612) 229-2723

Attorneys for Defendant
Metropolitan Council.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Minneapolis Branch of the National Association for the Advancement of Colored People, on behalf of themselves and all others similarly situated; Brystan Hill, by His Next Friend Lisa Hill; Sophie Krahnke, by Her Next Friends Steven Krahnke and Jane McLeod; Miquel McElroy, by His Next Friend Annie Pearl McElroy; Gregory McFarland, by his Next Friend Linda McFarland; Solveig and Anna Mebust, by their Next Friends Bruce Lynn Mebust and Kirsten Ann Scribner Mebust; and Diamond Porter, by His Next Friend Jamie Porter,

Plaintiffs,

Court File:_____

v.

AFFIDAVIT OF CHARLES N. NAUEN IN SUPPORT OF NOTICE OF REMOVAL

State of Minnesota; Arne H. Carlson, Governor, State of Minnesota;

Minnesota State Board of Education; Jeanne Kling (President), George Jernberg (Vice-President), Robert J. Brown, Erling Johnson, Thomas Lindquist, Tom Peacock, Shamus Roller, Nedra Wicks, Members of the Minnesota State Board of Education; Minnesota State Department of Education; Ann Schluter, Commissioner of Education; Minnesota Senate; Allan H. Spear, President of the Minnesota Senate; Minnesota house of Representatives; Irv Anderson, Speaker of the Minnesota House of Representatives; Robert Miller, Director of the Office of Desegregation/Integration of the Minnesota Department of Education; Michael A. McGrath, State Treasurer; Judith Dutcher, State Auditor; Hubert H. Humphrey III, Minnesota Attorney General; and The Metropolitan Council, a Public Body Corporate and Politic,

Defendants.

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

CHARLES N. NAUEN, being first duly sworn, upon oath states the following:

1. I am a partner with the Schatz Paquin Lockridge Grindal & Holstein P.L.L.P. law firm. My firm and I represent the defendant Metropolitan Council in the above-captioned action. I make this affidavit in support of the Metropolitan Council's Notice of Removal.

2. Attached as Exhibit A is a true and correct copy of the Summons and Complaint filed by plaintiffs in the Minnesota District Court, County of Hennepin, Fourth Judicial District, as served on the Metropolitan Council on September 19, 1995.

3. Attached as Exhibit B is a true and correct copy of the Second Amended Complaint in Hollman v. Cisneros, No. 4-92-712 (D. Minn.).

4. Attached as Exhibit C is a true and correct copy of the Consent Decree in Hollman v. Cisneros, No. 4-92-712 (D. Minn. April 21, 1995).

FURTHER AFFIANT SAITH NOT.

/s/ Charles N. Nauen
Charles N. Nauen

Subscribed and sworn to before me this 19th day of October 1995. /s/ Janet Treiber Notary Public

EXHIBIT A

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
CASE TYPE: MC

Minneapolis Branch of the National Association for the Advancement of Colored People, on behalf of themselves and all others similarly situated; Brystan Hill, by His Next Friend, Lisa Hill; Sophie Krahnke, by Her Next Friends, Steven Krahnke and Jane McLeod; Miquel McElroy, by His Next Friend, Annie Pearl McElroy; Gregory McFarland, by his Next Friend, Linda McFarland; Solveig and Anna Mebust, by Their Next Friends Bruce Lynn Mebust and Kirsten Ann Scribner Mebust; and Diamond Porter, by His Next Friend, Jamie Porter,

Court File:_____

Plaintiffs,

vs.

SUMMONS

State of Minnesota; Arne H. Carlson,

Governor, State of Minnesota;
Minnesota State Board of Education;
Jeanne Kling (President), George
Jernberg (Vice-President), Robert J.
Brown, Erling Johnson, Thomas
Lindquist, Tom Peacock, Shamus Roller,
Nedra Wicks, Members of the Minnesota
State Board of Education; Minnesota
State Department of Education; Ann
Schluter, Commissioner of Education;
Minnesota Senate; Allan H. Spear,
President of the Minnesota Senate;
Minnesota House of Representatives;
Irv Anderson, Speaker of the
Minnesota House of Representatives;
Robert Miller, Director of the
Office of Desegregation/Integration
of the Minnesota Department of
Education; Michael A. McGrath,
State Treasurer; Judith Dutcher,
State Auditor; Hubert H. Humphrey III,
Minnesota Attorney General; and
The Metropolitan Council, a Public
Body Corporate and Politic,

Defendants.

THE STATE OF MINNESOTA TO THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to serve upon plaintiffs' attorneys an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Dated: September 19, 1995. SHULMAN GAINSLEY & WALCOTT, P.A.

By /s/ Daniel R. Shulman
Daniel R. Shulman #100651
2999 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402
Telephone: (612) 338-5221
Attorneys for Plaintiffs

OMITTED FROM THIS EXHIBIT A
THE CLASS ACTION COMPLAINT --
SEE APPENDIX D

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
CASE TYPE: MC

CASE NO._____

CERTIFICATE OF REPRESENTATION AND PARTIES

(ONLY THE INITIAL FILING LAWYER/PARTY NEEDS TO COMPLETE THIS FORM)

Date Case Filed: September 19, 1995

Minneapolis Branch of the National Association for the Advancement of Colored People, et al. vs. State of Minnesota, et al.

This certificate must be filed pursuant to Rule 104 of the General Rules of Practice for the District Courts, which states: "A party filing a civil case shall, at the time of filing, notify the court administrator in writing of the name, address, and telephone number of all counsel and unrepresented parties, if known (see form 104 appended to these rules). If that information is not then known to the filing party, it shall be provided to the court administrator in writing by the filing party within seven days of learning it. Any party impleading additional parties shall provide the same information to the

court administrator. The Court administrator shall, upon receipt of the completed certificate, notify all parties or their lawyers, if represented by counsel, of the date of filing the action and the file number assigned."

LIST ALL LAWYERS/PRO SE PARTIES INVOLVED IN THIS CASE.

LAWYER FOR PLAINTIFFS	LAWYERS FOR DEFENDANTS (If not known, name party and address)
Minneapolis Branch of the National Association for the Advancement of Colored People, et al.	
Name of Party	SEE ATTACHED SHEET Name of Party
Daniel R. Shulman Atty Name (Not firm name)	Atty Name(Not firm name)
2999 Norwest Center 90 South Seventh Street Minneapolis, MN 55402 Address	Address

(612) 338-5221	
Phone Number	Phone Number
100651	
MN Atty ID No.	MN Atty ID No.
Dated: September 19, 1995.	/s/ Daniel R. Shulman
	Daniel R. Shulman,
	Filing Party

ATTACHMENT TO CERTIFICATE OF REPRESENTATION

DEFENDANT	ATTORNEY
State of Minnesota c/o Arne H. Carlson Governor State of Minnesota State Capitol 100 Constitution Avenue St. Paul, MN 55155	
Arne H. Carlson Governor State of Minnesota State Capitol 100 Constitution Avenue St. Paul, MN 55155	
Minnesota State Board of Education 714 Capitol Square Building 550 Cedar Street St. Paul, MN 55101	

Jeanne Kling
President
Minnesota State Board of Education
714 Capitol Square Building
550 Cedar Street
St. Paul, MN 55101

George Jernberg
Vice-President
Minnesota State Board of Education
714 Capitol Square Building
550 Cedar Street
St. Paul, MN 55101

Robert J. Brown
Member
Minnesota State Board of Education
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Erling Johnson
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Thomas Lindquist
Member
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Tom Peacock
Member
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Shamus Roller
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Nedra Wicks
Member
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Minnesota State Board of Education
714 Capitol Square Building
550 Cedar Street
St. Paul, MN 55101

Ann Schluter
Commissioner of Education
711 Capitol Square Building
550 Cedar Street
St. Paul, MN 55101

Minnesota Senate
State Capitol
100 Constitution Avenue
St. Paul, MN 55155

Allan H. Spear
President of the Minnesota Senate
Room G27
State Capitol
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St. Paul, MN 55155

Minnesota House of Representatives
State Capitol
100 Constitution Avenue
St. Paul, MN 55155

Irv Anderson
Speaker of the Minnesota
House of Representatives
State Capitol
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Robert Miller
Director of the Office of
Desegregation/Integration of the
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550 Cedar Street
St. Paul, MN 55101

Michael A. McGrath
State Treasurer
303 State Administration Building
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St. Paul, MN 55155

Judith Dutcher
State Auditor
525 Park Street
Suite 400
St. Paul, MN 55103

Hubert H. Humphrey III
Minnesota Attorney General
1400 NCL Tower
445 Minnesota Street
St. Paul, MN 55155

The Metropolitan Council
230 East Fifth Street
St. Paul, MN 55101

EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Lucy Hollman, Shirlnice Givens, Mai Yang, Charlotte Brown, Vanessa Boateng, Lia Shoua Pha, Anne Balentine, Josephine Hill, Joyce Charles, Her Hang, Marlene Halloway, Patricia Scott, Gertrude Marks, Michelle Barnes, Earline Robertson, Jacqueline Trass, and Lawrence Madison, on behalf of themselves and all others similarly situated, and the Minneapolis Branch of the National Association for the Advancement of Colored People (NAACP),

Plaintiffs,

v.

SECOND AMENDED CLASS ACTION COMPLAINT
Civil 4-92-712

Jack Kemp, in his official capacity

as Secretary of the Department of Housing and Urban Development, Thomas T. Feeney, in his official capacity as Field Office Manager of the Minneapolis-St. Paul Office of the Department of Housing and Urban Development, the United States Department of Housing and Urban Development, Cora McCorvey, in her official capacity as Executive Director of the Minneapolis Public Housing Authority, the Minneapolis Public Housing Authority, in and for the City of Minneapolis, a public body corporate and politic, the Minneapolis Community Development Agency, a public body corporate and politic, the City of Minneapolis, a public body corporate and politic, and the Metropolitan Council, a public body corporate and politic.

Defendants.

I. INTRODUCTION

1. Plaintiffs, low-income minority families and individuals in Minneapolis and the Minneapolis Branch of the National Association for the Advancement of Colored People

(NAACP), bring this class action to challenge racial segregation in the administration of low-income housing programs. Individual plaintiffs and class members are participants in, and applicants for, federally subsidized low-income housing programs in Minneapolis who have been or likely will be limited to participating in these programs in racially segregated locations due to the actions of federal and local government defendants. Public Housing in Minneapolis was originally located, built and operated by the original defendants (federal and local government defendants) under a policy of *de jure* racial segregation, and neither local defendants nor federal defendants have taken the constitutionally and statutorily required steps since then to disestablish the largely one-race projects caused by *de jure* segregation.

2. Subsequent programs provided the original defendants with the opportunity to avoid segregated patterns. The Public Housing Scattered Site Program and the Section 8 Existing Housing Program are both designed to provide plaintiffs with opportunities to live in racially integrated neighborhoods. However, original defendants have administered these programs in a manner which has also perpetuated pre-existing segregated housing patterns.

3. HUD has supervised, funded, and participated in the activities of local defendants and their predecessors over the last 54 years and has been well aware of the segregated manner in which these programs have been

administered. Despite its legal obligation to affirmatively further the goals of the Fair Housing Act, HUD has taken no effective measures to compel defendants to alter these segregated housing patterns. In addition, HUD has contributed to the perpetuation of segregation by its own actions.

4. By initially creating and/or perpetuating segregated housing patterns in the Public Housing and Section 8 Existing Housing Programs in Minneapolis, original defendants have violated the Fifth and Fourteenth Amendments to the United States Constitution, the Fair Housing Act of 1968, Title VI of the 1964 Civil Rights Act, the Minnesota Constitution and other federal and state civil rights and housing statutes and regulations. Plaintiffs seek declaratory and injunctive relief, damages, and attorneys' fees.

5. Because correcting the pattern of racial segregation set out herein is difficult to accomplish solely within the borders of the City of Minneapolis, plaintiffs seek metropolitan area-wide remedies. Defendant Metropolitan Council has the main responsibility, under state law and its own policy and rules, for fairly distributing low income housing throughout the metropolitan area and assuring that low income households have housing opportunities in integrated neighborhoods throughout the metropolitan area. Defendant Metropolitan Council has largely abandoned any effort to carry out this responsibility, in violation of its own

policies and rules, the Fair Housing Act of 1968, and the Minnesota Human Rights Act. Defendant Metropolitan Council's actions and inactions have injured plaintiffs and made it more difficult to desegregate the public housing and Section 8 programs. As to defendant Metropolitan Council, plaintiffs also seek declaratory and injunctive relief, and attorneys fees.

II. JURISDICTION

6. This court has jurisdiction over this action pursuant to 28 U.S.C §§ 1331, 1343(a)(3) and 1361, and 42 U.S.C. § 3613(a). Civil actions against state and local defendants are authorized by 42 U.S.C. §§ 1981, 1982, 1983, and 1985(3). Civil actions against the federal defendants are authorized by, among other sources, 5 U.S.C. § 702, 42 U.S.C. § 3613, and 42 U.S.C. § 2000d. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202, and jurisdiction over plaintiffs' state law claims is authorized by 28 U.S.C. § 1367.

III. PLAINTIFFS

7. Plaintiff Lucy Hollman is a 33 year old black woman who has four children. She and her children have lived in public housing in the MPHA's heavily segregated Sumner-Olson Project on the Northside of Minneapolis for eight years. The condition of her project and the surrounding neighborhood is poor and is dangerous due to crime. Both security and maintenance of her unit and the surrounding area are significantly worse than that of more identifiably white

elderly highrises, or the less segregated Glendale Family Project in Southeast Minneapolis. Ms. Hollman wants to move to the suburbs.

8. Plaintiff Shirlnice Givens is a 34 year old black woman. She lived with her three children in the Sumner-Olson Project for over five years. When Ms. Givens applied for a housing subsidy she inquired about a Section 8 Certificate but was told the waiting list was closed. She did not like the unit she was shown, but was told if she did not accept the unit she would be placed at the bottom of the waiting list. The condition of Ms. Givens' unit was in substantial disrepair. Ms. Givens repeatedly sought a transfer due to fear of violent crime in the project endangering her children, but was denied by MPHA. Following a shooting through her window, Ms. Givens was forced to move out of Sumner-Olson and into market rate private housing in a predominantly minority area of Minneapolis in order to protect her children and because it was all she could afford. Ms. Givens would like to live in an integrated neighborhood in a suburb. She has applied for public housing in St. Louis Park, an apartment in Brooklyn Park, and has looked for housing in Bloomington, where she is employed at the Mall of America. To date, she has been unable to find affordable housing in an integrated neighborhood in either Minneapolis or the suburbs.

9. Mai Yang is a 43 year old Hmong woman. She has lived with her four children in the MPHA's

Glenwood-Lyndale Family Housing Project for seven years. When Ms. Yang was shown her current unit she felt it was in an unsafe neighborhood and told MPHA she did not like the unit. She was told that if she did not take the unit she would have to rent from the private market. Ms. Yang's unit is in poor condition. Ms Yang believes the project and her neighborhood are unsafe. Ms. Yang would like to move out of the housing project to a suburb, where she could raise her children in a safer environment.

10. Charlotte M. Brown is a 34 year old black woman with three children who has lived in the Sumner-Olson Project for 18 years. When she first applied for housing assistance, she was offered a Section 8 Certificate which could have enabled her to live anywhere in the city. But, without transportation and with a baby, she was unable to find housing. She was not assisted by MPHA. She then accepted housing in the Sumner-Olson Project where she did not want to live. The condition of her unit and the surrounding area and playfields is poor. When Ms. Brown identifies her home as "the Projects" on job applications or at meetings, she gets a negative reaction. Ms. Brown wants her unit and the project rehabilitated and maintained, or she wants a Section 8 Certificate to move to a "decent" neighborhood.

11. Vanessa Boateng is a 35 year old black woman who has lived with her two children in the Sumner-Olson Project for five years. Ms. Boateng and her children have had

to contend with gunfire at the local public park. Ms. Boateng would like her apartment, the project grounds, and her neighborhood improved. She believes that if there were more white residents living in her housing project the MPHA would take better care of the apartments and the neighborhood. She has been waiting five years for a Section 8 Certificate. If she had a Certificate she would move farther north or to the suburbs.

12. Lia Shoua Pha is a 36 year old Hmong man. He lives with his wife and eight children in the Glenwood-Lyndale Housing Project. He believes the project is too crowded and he is not satisfied with the conditions there. He wants his children to grow up in an area where kids aren't getting involved in crime so often. He is interested in moving outside areas of minority concentration, possibly to the Lake Nokomis area.

13. Anne Balentine is a 51 year old black woman who lives with one son at 1130 4th Avenue North, Minneapolis, MN 55405, in the Glenwood-Lyndale housing project. From 1977 to 1993, she lived at 916 Olson Highway, in the Sumner-Olson projects. Ms. Balentine would like to stay in the neighborhood, but she would like to see it become more racially integrated, safer, better maintained, and with better apartments.

14. Plaintiff Josephine Hill, a black woman, is married to James Hill. They have eight children. Three years ago, the Hill family moved into a Scattered Site home, which

is owned by defendant MPHA, and located close to the MPHA Family Rowhouse Projects in North Minneapolis in a predominantly black neighborhood. She was given no choice; she was told this was the only 5 bedroom unit available. Mrs. Hill has not been able to get MPHA to make necessary repairs on her house. Mrs. Hill's repeated requests for a transfer have been denied. Drug related criminal activity in the neighborhood, locally known as "crack alley," has caused constant harassment of the Hill family by people soliciting drug sales or offering drugs. Mrs. Hill believes other neighborhoods would be safer for her family and receive better police protection. She would prefer to move farther north to a more integrated section of Minneapolis where she used to live. Mrs. Hill has applied to MPHA for a Section 8 Certificate/Voucher.

15. Plaintiff Joyce Charles is a 50 year old black woman. Until recently Ms. Charles lived in a MPHA Scattered Site house in North Minneapolis with her adult disabled son, her daughter and three grandchildren. Ms. Charles had not wanted to live in North Minneapolis but had been waiting for Public Housing for years when her current house was offered to her. The neighborhood is largely black. Ms. Charles believes she was directed toward the Scattered Site house because of her race. Her neighborhood was very noisy and there were problems with crime. Her family was robbed twice. After her request for a transfer was denied by MPHA, Ms. Charles concluded she could not tolerate

conditions any longer, and recently moved into private housing resulting in a rent increase from $121/month to $485. She has applied to MPHA for a Section 8 Certificate/Voucher, in the hope she can move to an integrated neighborhood of South Minneapolis or the suburbs.

16. Her Hang is a 25 year old Hmong man. He lives with his wife and five children in an MPHA scattered site house in a minority-concentrated area of North Minneapolis. They moved there in 1989. He has also applied for Section 8 and believes that he is on the waiting list. He and his family would like to live in a safer neighborhood outside areas of minority concentration. He believes such a neighborhood will be less frightening.

17. Plaintiff Marlene Halloway is a 31 year old black woman who has five children. She received a Section 8 Voucher from the MPHA, but had trouble finding an apartment to rent. She was advised by MPHA staff to look in the largely black neighborhoods of North Minneapolis, but she did not want to move to those neighborhoods because she believed crime is a big problem there. The Section 8 office did nothing more to help her locate housing. Ms. Halloway's Voucher expired before she could find a place to rent and her Section 8 assistance was terminated. Ms. Halloway was forced to reside in racially concentrated market rate housing in poor condition which consumed 77% of her monthly AFDC grant. She was eventually able to purchase a home herself, but has suffered economic injury due to her loss of

her Section 8 voucher.

18. Patricia Scott is a 37 year old black woman who has a Section 8 Voucher administered by MPHA. Ms. Scott has been living with her three children and six grandchildren in the identifiably minority Near Northside community, and has recently moved to another home just a few blacks away. She wanted to move to Brooklyn Park or Brooklyn Center, but was unable to find a unit and was forced to remain in her current neighborhood. Ms. Scott does not feel safe in the neighborhood. She has been mugged and beaten up badly. She received no assistance from the Section 8 Program. They only gave Ms. Scott a list of four apartments, all of which are in heavily segregated neighborhoods. Ms. Scott has been stereotyped because of the neighborhood in which she lives. When prospective landlords find out where Ms. Scott lives, they assume she is a criminal and ask if her son is a gang member. Ms. Scott would like to move to an integrated neighborhood to escape not only the stereotypes connected with her current address, but the poor conditions and threat of crime at her current location.

19. Gertrude Marks, a 37 year old black woman, holds a Section 8 certificate from MPHA. Ms. Marks originally obtained her certificate through the Metro HRA, but after one year living in Eagan, she was unable to find another apartment in the suburbs, and was forced to move into North Minneapolis. She now lives with three children in

North Minneapolis, in an area of minority concentration. She has been looking for a new apartment and wants to live in a safer, quieter, more integrated neighborhood, outside the inner city where the apartments are in better condition. Ms. Marks requested help from MPHA in finding such housing, but received no help, and was recently forced to settle for accepting another apartment in a predominantly minority section of North Minneapolis.

20. Michelle Barnes, a 29 year old black woman, holds a Section 8 certificate from MPHA, though it was originally obtained through Metro HRA. She lives with her four children in North Minneapolis in an area of minority concentration. She would like to live in a safer, more integrated neighborhood in the suburbs where the apartments are in better condition.

21. Earline Robertson, a 38 year old black woman, holds a Section 8 certificate from MPHA. Her certificate originated in Plymouth, but after a year living there, she could not find a unit in Plymouth to use her new certificate, and was forced to take it into Minneapolis. She has lived with her three children in North Minneapolis since October 1993, in a racially concentrated neighborhood. She would like to live in a safer, more integrated neighborhood where the apartments are in better repair, in the city or suburbs. The last place she rented was condemned for repair problems. She then had to stay with friends for a long time before she could find a place that took Section 8 and was livable.

22. Jacqueline Trass is a 30 year old black woman. Ms. Trass moved into her current Northside unit after being turned down by a private landlord in Northeast Minneapolis due to her race. She is eligible for Section 8 and recently applied to MPHA for a Certificate or Voucher for herself and her son. Ms. Trass wants to live in an integrated neighborhood in Northeast Minneapolis because of its proximity to her job and because she believes that an integrated neighborhood would be better kept up and safer for herself and her son than the Northside neighborhood where she currently resides. Unless MPHA reforms the manner in which it administer Section 8, however, this goal may be difficult for her to achieve.

23. Lawrence Madison is a 28 year old black man. He lives with his two children in the predominantly black Near Northside neighborhood. Mr. Madison has applied for both Public Housing and for a Section 8 Certificate or Voucher and is on the waiting lists. Mr. Madison hopes to use his future Section 8 Certificate to move to an integrated area such as New Hope or Brooklyn Park. He wants to raise his children in an integrated neighborhood because he believes the schools are better, and because he believes it is important for his children to have daily exposure to other cultures. Mr. Madison likely will need the assistance of MPHA in finding an appropriate unit.

24. The Minneapolis Branch of the National Association for the Advancement of Colored People (the

"NAACP") is an organization that historically has been available to represent the interests of black people in the Twin Cities metropolitan area. While membership consists of individuals with diverse racial and ethnic backgrounds, the NAACP's goals and efforts are directed solely toward achieving racial justice for black Twin Citians (its "constituency"), some of whom are also members of the NAACP. The NAACP expends considerable time, energy, and money in its efforts to achieve racial justice for its constituency.

25. The discriminatory administration of MPHA's Public Housing and Section 8 Housing Assistance Programs, and the failure of the Metropolitan Council to carry out its responsibilities to distribute low income housing fairly throughout the Metropolitan area, have interfered with the efforts of the NAACP to achieve racial justice for its constituency. Such interference results in a constant drain on the NAACP's resources and causes injury in fact to the NAACP.

26. The requested relief -- the ending of the discriminatory administration of public housing programs in the Twin Cities metropolitan area -- is germane to and consistent with the goals and purpose of the NAACP. Individual members of the NAACP's constituency would have standing to seek the relief requested herein in their own right. However, neither the claims asserted nor the relief requested require their participation in this action.

IV. DEFENDANTS

27. Defendant Jack Kemp is sued in his official capacity as Secretary of the United States Department of Housing and Urban Development. He is responsible for ensuring defendant HUD's compliance with the Constitution and laws of the United States.

28. Defendant Thomas T. Feeney is sued in his official capacity as Field Office Manager of the Minneapolis-St. Paul Area Office of HUD. He is responsible for oversight of the agencies administering the Public Housing and Section 8 Existing Housing Programs in the Minneapolis area.

29. Defendant United States Department of Housing and Urban Development (HUD) is the agency of the federal government designated to administer federally subsidized low-income housing programs, including the Public Housing and Section 8 Existing Housing Programs.

30. Defendant Cora McCorvey is sued in her official capacity as Executive Director of the Minneapolis Public Housing Authority (MPHA), and in that capacity is responsible for the administration of MPHA's Public Housing and Section 8 Existing Housing Programs.

31. Defendant Minneapolis Public Housing Authority in and for the City of Minneapolis (MPHA) is a public body, corporate and politic. It owns and operates Public Housing units within the City of Minneapolis and administers the Section 8 Existing Housing Programs for the City of Minneapolis.

32. Defendant City of Minneapolis is the local government body which governs the City of Minneapolis. The City Council has exerted, and continues to exert, substantial control over the Public Housing and Section 8 Programs in the City of Minneapolis through the Minneapolis Housing and Redevelopment Authority (MHRA), the Minneapolis Community Development Agency (MCDA), and the MPHA. The City is also responsible for providing police, park board, and other public services to areas such as Northside Public Housing Projects.

33. Defendant Minneapolis Community Development Agency (MCDA) administered the Public Housing and Section 8 Existing Housing Programs for the City of Minneapolis from 1981 until a period from 1986 through 1990, when responsibility for the program was gradually transferred to MPHA. The MCDA continues to undertake Public Housing-related activities for MPHA, such as acquisition of Scattered Site locations, as well as to dispenses City funds to both segregated and integrated neighborhoods of the City.

34. The Metropolitan Council (hereinafter "Met Council") is a political subdivision of the State of Minnesota created to "coordinate the planning and development of the metropolitan area." One of its tasks is to fairly distribute low income housing and integrated housing opportunities throughout the metropolitan area. To achieve that end, it has promulgated policies and rules, and created, pursuant to state

law, the Metropolitan Housing and Redevelopment Authority (Metro HRA) which has all the powers and duties of housing and redevelopment authorities created for municipalities.

V. CLASS ACTION ALLEGATIONS

35. Plaintiffs are a class of eligible low-income minority families and individuals who are participating in, or who have applied for, defendant MPHA's Family Public Housing or Section 8 Existing Housing Programs, and who either desire to live in a racially integrated neighborhood in either Minneapolis or metropolitan area suburbs or who seek building and neighborhood conditions in segregated areas equal to those of racially integrated buildings and neighborhoods.

36. The members of the class are so numerous that joinder of all members is impracticable. Approximately 5,100 families and individuals currently participate in MPHA's Public Housing and Section 8 Existing Housing Programs, and approximately 3,800 families and 1,700 individuals are on waiting lists. Approximately 46% of MPHA program participants are minority, and approximately 71% of applicants on the waiting lists are minority.

37. There are common questions of law and fact applicable to the class as a whole, including whether defendants have violated plaintiffs' rights by creating and perpetuating racially segregated housing within the Public Housing and Section 8 programs.

38. The claims of the named plaintiffs are typical

of the claims of the class as a whole, in that the named plaintiffs are participating in, or waiting to participate in programs which give them little realistic opportunity to live in integrated areas of the City of Minneapolis or suburbs. These representative parties will fairly and adequately protect the interests of the class. The individual plaintiffs and class are represented by the Legal Aid Society of Minneapolis, which is experienced in class action litigation.

39. The action is maintainable as a class action under FED R. CIV. P. 23(b)(2), in that the defendants have acted and failed to act in a manner that is generally applicable to the class, making declaratory and corresponding injunctive relief applicable to the class as a whole.

VI. THE PUBLIC HOUSING PROGRAM IN MINNEAPOLIS

40. The Public Housing Program originated with the United States Housing Act of 1937, which is currently codified at 42 U.S.C. § 1437. Public Housing units are owned and operated by local public housing authorities (PHAs), such as MPHA, created pursuant to state enabling legislation.

41. Public Housing can be occupied only by low-income persons and rents are limited to thirty percent (30%) of income. Since a PHA's income from tenant rents does not come close to equaling the costs of either development or operation and maintenance of the projects, HUD contributes not only the principal and interest payments on the bonds, but

also provides operating subsidies to PHAs.

42. HUD has the ultimate responsibility to ensure that local PHAs properly operate Public Housing Programs, and to that end HUD has imposed extensive duties upon the PHAs through the Annual Contributions Contracts (ACCs), regulations, and various handbooks, circulares, and notices.

43 The first low-rent Public Housing Project constructed in Minneapolis was the Sumner-Field Project, built by the United States Housing Authority (USHA), HUD'S predecessor, in 1938. This Family Housing Project of 464 units was located in the Near Northside area of Minneapolis, straddling the line between a white community and where the City's black community was concentrated. Federal and local officials chose this location, knowing it would serve to confine low-income families from the black community to this segregated neighborhood. After constructing Sumner-Field, the USHA deliberately segregated black families further by restricting them to the east half of the project, while whites lived in the west half.

44. In 1950, the City of Minneapolis and the Minneapolis Housing and Redevelopment Authority (MHRA) received authorization from the USHA for 1,000 units of low-rent Public Housing for families. The MHRA was responsible for choosing locations for family Public Housing projects, but the Minneapolis City Council had effective veto power over all sites.

45. With the one exception of the Glendale project

in Southeast Minneapolis, all Family Public Housing projects were ultimately located in the Near Northside of Minneapolis, adjacent to the pre-existing Sumner-Field Project, thus confining minority low-income families to the section of the City where they were already most concentrated.

46. The decision by the city and the MHRA to place 816 units in the black community of the Near Northside was motivated in large part by a desire to intentionally segregate minority tenants in order to satisfy community opposition to racial integration. The Public Housing Administration, the successor of the USHA and the predecessor of HUD, approved and fully funded these segregative acts.

47. In its administration of Public Housing, the Minneapolis HRA and its successors, MCDA and MPHA, adopted tenant selection and assignment policies which permitted white applicants to avoid living near minorities. Over time, these policies contributed to increasing racial segregation within Minneapolis Public Housing, as whites left Public Housing for the Section 8 program or other sources of housing, leaving the Northside Family Projects virtually all minority.

48. Beginning in early 1960's, the MHRA stopped building controversial Family Housing Projects and shifted its emphasis to constructing highrise apartment buildings for the elderly. Over the next ten years, the MHRA and its successors created 5,147 highrise units, more units for the

elderly than were produced by any other housing authority in the nation. In contrast to Family Housing Projects, this was done for a virtually all white population. Unlike the Family Projects, these highrise buildings were scattered through many white neighborhoods of the City.

49. Despite awareness of a growing need for family units for minority families, the City and MHRA policies disproportionately favored constructing identifiably white elderly housing over identifiably minority family housing. These discriminatory policies were fully approved and funded by HUD. As a result, there are currently enough Public housing highrise units in Minneapolis, serving a largely white population, to meet the needs of 97% of elderly households in Minneapolis. By contrast, there are family Public Housing units, serving largely a minority population, sufficient in number to meet the need of 32.5% of low-income families in Minneapolis.

50. Beginning in 1967, MHRA produced additional family housing through its Scattered Site Program which placed families in individual homes in different parts of the City. However, due to the continued operation of the aldermanic veto power at the City Council level, and Council attempts to restrict Scattered Site largely to minority neighborhoods, Scattered Site units became concentrated in the racially segregated neighborhood in the Near Northside and in certain largely minority sections of South Minneapolis. To this day, most Scattered Site units are located in minority

neighborhoods.

51. In addition to the highly concentrated Family Public Housing already located on the Near Northside, HUD approved and funded at least seven other low-income housing projects, as well as a number of Scattered Site units, in the immediate vicinity of the Family Public Housing projects. All of these projects quickly became predominantly minority in racial composition. In addition to the racial concentrations and high density of residents, for the most part these projects are surrounded by industrial and commercial development, empty blocks, park and school land, thus creating an isolated community occupied almost exclusively by blacks and other minorities.

52. Since the initiation of the Public Housing program in Minneapolis, HUD has periodically performed audits or reviews of the program of the Minneapolis HRA, later the MCDA, and most recently the MPHA. At least since 1979 and continuing up until the present time, HUD has repeatedly raised the issue of the racially segregated nature of the Public Housing program with the MPHA and its predecessors. None of the very limited strategies suggested by HUD, nor the equally limited strategies attempted by MPHA and its predecessors, have effectively reduced segregation.

53. Statistics compiled in 1991 show that at least 38 of 48 Public Housing Project sites (79%) are racially identifiable by HUD's own definition. All the Family

Housing Projects are racially identifiable by HUD standards. The five Northside Family Projects have become so racially concentrated that they now comprise 98% families of color. By contrast, the percentage of whites in the elderly highrise buildings remains at 74.5%. Thirty-one of 41 elderly projects are racially identifiable. The nine elderly highrises in the Northeast Minneapolis area remain 95% white.

54. Just as was the case with blacks before them, MPHA has placed Southeast Asian families in the most segregated housing. As of 1991, Southeast Asian families occupied 53% of the Family Project units, 29% of the somewhat less segregated Scattered Site units, and only 7% of the Section 8 Existing Housing units.

55. With few exceptions, minority families continue to find themselves effectively confined to racially segregated neighborhoods on the Near Northside and Southside of Minneapolis. Aside from suffering the stigma of living in segregated housing, these minority families are forced to reside in areas with the highest crime rates, most dilapidated housing, and fewest job opportunities. Moreover, the Northside Family Projects have been maintained by defendants MPHA, MCDA, McCorvey and the City in a state of inferior maintenance, with less security, and fewer amenities, than either the identifiably white elderly highrises or the less segregated Glendale Family Project in Southeast Minneapolis. These practices have been knowingly continued by local defendants, and approved by defendant HUD.

56. In addition to providing segregated, extremely dense and isolated housing, the Northside family rowhouse projects are currently undergoing extensive physical deterioration. Many of the units sit on shifting subsoil that causes the building foundations, as well as the buildings themselves, to crack and separate. The cost of repairing and adequately shoring up these damaged buildings, as well as the remainder of the project site, is now approaching the cost of constructing or acquiring new public housing units in other locations. As a result, many of these units will qualify under federal law for demolition and replacement in other locations, including the suburbs. Replacement outside the borders of Minneapolis, however, will require, in many cases, the cooperation of the city where the units would be located. Without some incentives or disincentives, many suburban communities will be reluctant to accept low income housing for Minneapolis residents.

VII. THE SECTION 8 PROGRAM IN MINNEAPOLIS

A. The Section 8 Certificate and Voucher Programs.

57. In the Housing and Community Development Act of 1974, Congress adopted the Section 8 housing programs as the primary vehicles for the federal government's efforts to provide an adequate supply of low-income housing. 42 U.S.C. § 1437f. The Section 8 Existing Housing Program, 42 U.S.C. § 1437f(b), emphasizes racial and economic integration through tenant freedom to locate throughout the

community. Under this program, a Section 8 Certificate-holder uses federal housing assistance payments to rent an apartment at or below the HUD-established Fair Market Rent (FMR) for the locality, and contributes no more than 30 percent of his/her adjusted annual income toward rent. 24 C.F.R. §§ 813.107(a), 882.106.

58. More recently, pursuant to 42 U.S.C. § 1437f(o), Congress established a variation on the Certificate Program known as the Section 8 Voucher Program. The principal difference is that a Voucher holder can theoretically choose a unit renting for more than the FMR if the Voucher family is prepared to pay the additional rent themselves. *See* 24 C.F.R. Parts 882 and 887. Originally, a Certificate holder was limited to the boundaries of the jurisdiction issuing the Certificate. Under the principle known as "portability," participants are no longer confined to the jurisdiction of the administering agency; Certificate-holders are now free to take their Certificates anywhere in the state, Voucher-holders anywhere in the country.

B. The MPHA's Section 8 Program.

59. Beginning in 1975, the MHRA instituted a Section 8 Certificate Housing Program (also known as the Section 8 Existing Housing Program) to provide low-income families and individuals in the City a low-income housing alternative to Public Housing. The MPHA currently administers approximately 2614 Certificates and 342 Vouchers.

60. In practice, the Section 8 Existing Housing Program as administered by MHRA, MCDA and now MPHA has not functioned as the law requires. Both Section 8 Certificate and Voucher holders are concentrated in the same segregated inner city neighborhoods where Public Housing Projects are located. Many minority family program participants, including plaintiffs, want to live in other neighborhoods of the City or in the suburbs, but despite their own best efforts, have not been able to do so.

61. MPHA's administration of the Section 8 Certificate and Voucher Programs has had a disproportionately adverse impact upon participating minority families, both in perpetuating patterns of racially segregated housing in Minneapolis, and in imposing a greater relative harm upon participating minority families.

62. The current pattern of concentration has been caused, at least in part, by the failure of MPHA and its predecessors to fulfill their legal obligations in administering the Section 8 Existing Housing Program. MPHA is required by 24 C.F.R. Parts 882 and 887 and HUD Handbooks 7420.7 and 7420.3 to provide a wide variety of assistance to Certificate/Voucher holders in addition to providing rent subsidies. When families are issued Certificates and told to locate housing, MPHA has provided informational packets to participating families which provide conflicting, inaccurate and incomplete information. MPHA has failed to maintain consistent periodic contact during the 60 day period for

finding housing, and to identify problems and resolve them in order to ensure families have the broadest choices available to them. When families have requested assistance from MPHA because the families have been unable to find units due to age, handicap, discrimination or other reasons, MPHA has failed to provide information about non-concentrated areas, transportation to those areas, child care, escort services, listings of owners and vacancies in those areas, or any other assistance which helps families to have a wide choice of available units in the market. Moreover, MPHA has not advised such "hard-to-house" families they have the right to ask for such assistance.

63. MPHA has failed to encourage effectively the participation of owners of units in areas other than low-income or minority concentrated areas, and has failed to advise families of opportunities to lease housing in such non-concentrated areas. In fact, in some cases, MPHA has encouraged minority Certificate/Voucher holders to seek housing in the most minority-concentrated neighborhoods of Minneapolis.

64. In many cases, participating families have needed authorization for higher FMRs in order to be able to rent units outside of segregated neighborhoods. Despite having the authority under 24 C.F.R. Part 882 and HUD Handbooks 7420.3 and 7420.7 to approve 10% increases in FMR on a unit-by-unit basis where necessary, MPHA has failed to do so. MPHA has also failed to inform participating

families that they could apply to MPHA for authorization to contract for rent at a higher FMR. Thus, families give up on renting units offered above FMR levels without knowing they could ask for special authorization.

65. In order for participating families to live in many of the more expensive city neighborhoods or suburban locations, higher FMRs are necessary for certain neighborhoods, municipalities or localities. Despite the fact that 24 C.F.R. § 882.106(a)(3) and (4) give MPHA the authority to apply to HUD for permission to raise FMRs in such areas by 20%, MPHA has failed to do so.

66. By failing to increase the Voucher Payment Standard for six consecutive years (1985-1991), MPHA ensured that the Voucher progressively covered an ever smaller share of the rent, making it more difficult for families to choose to pay extra rent to live in an integrated location. Even after recently increasing the Voucher Payment Standard, the subsidies provided by MPHA are still only 89% of MPHA's FMR schedules.

67. For a number of years HUD has been aware that MPHA has failed to take the steps enumerated above to effectively increase opportunities for geographic mobility. HUD is also aware that current patterns demonstrate that Section 8 Certificate and Voucher holders are concentrated in the most segregated neighborhoods of Minneapolis. Despite this knowledge, HUD has taken no action to require MPHA to undertake corrective measures as required by law.

VII. THE METROPOLITAN COUNCIL AND SUBURBAN LOW INCOME HOUSING

68. Beginning in 1971, the Met Council recognized the need to respond to an overwhelming concentration of metro area low income housing units in the central cities of Minneapolis and St. Paul, by encouraging the location of low income housing units in the suburbs. At that time, only 10% of all low and moderate income housing was located in the suburbs, even though the suburbs contained over half the metro area population. The Council adopted policies to improve location choice as part of its first housing guide, and subsequently reaffirmed and strengthened those policies in later years.

69. The most significant of these policies, originally labeled Policy 13 and now known as Policy 39, originally gave, and continues to give the Council substantial leverage over suburban communities seeking funding:

> Policy 39: In reviewing applications for funds, the Met Council will recommend priority in funding based on the local government's current provision of housing opportunities for people with low and moderate incomes, and its plans and programs to provide such housing opportunities in the future.

The Council's explanation of the policy also notes that it "applies to all local applications for state and federal funding."

70. Other Council policies played important roles

also, including Policy 34, which calls for the Council to use its review powers to encourage communities to meet area-wide low income needs rather than strictly local needs, and Policy 38, which requires the Council to apply its review guidelines to the housing elements of local communities' comprehensive plans and development proposals.

71. In 1973, the Council adopted its subsidized Housing Allocation Plan. Based on the principle that each community had a responsibility to provide a "fair share" of the area's low and moderate income housing, the plan established subsidized housing goals for each suburb. In 1975, the Council also established the Metropolitan Council Housing and Redevelopment Authority (Metro HRA) to operate the Section 8 Housing Assistance Program in 13 suburban communities (now 77 communities), as well as other housing programs.

72. Over time, these Council policies resulted in a dramatic improvement in the distribution of housing opportunities throughout the area. Between 1971 and 1983, the suburban share of the area's subsidized housing grew from 10% to 41%.

73. Beginning in the early 1980's, however, the Council abandoned enforcement of its own rules, including Policy 39, despite the fact that these rules have never been revoked, or abrogated in any manner. The Council's abandonment of its still legally binding policies removed the principle incentive suburban communities had to provide low

income housing.

74. Along with its statutory authority to review cities' funding applications under Minn. Stat. § 473.171, the Council is also required to review all proposed matters of metropolitan significance, pursuant to Minn. Stat. § 473.173. Despite the fact that concentrations of poverty and low income housing are matters of metropolitan significance, the Council has failed to give any consideration to such factors in its reviews pursuant to this statute.

75. Partly as a result of the Council's abandonment of its policies, progress in redressing the imbalance between central city and suburban low income housing opportunities has virtually halted, with nearly 60% of the area low income housing still in the central cities. This has happened at the same time that the metro area has become increasingly polarized between central cities burdened with growing concentrations of poverty while new job growth has mostly located in the area's suburbs which are the most affluent and generally have the least low income housing. In addition, many of these suburbs pursue zoning and land use policies which have the effect of excluding low and moderate income housing.

76. At the same time that the Met Council has stopped holding suburban communities accountable for low income housing development, the Council has accelerated the polarization of the metro area by income and race by repeatedly approving funding for infrastructure expenditures

such as sewer extensions, roads, and schools in many of the same suburban communities that have the least low income housing and the most exclusionary housing policies.

77. Had the Council enforced its own rules in the last decade, suburban low income housing opportunities would be significantly greater today. Application of Policy 39 to all funding applications by suburban cities would have compelled them to facilitate the production of low and moderate income housing in the same fashion that the City of Minneapolis has accomplished in the last decade, despite the paucity of federal funding. Application of Policy 34 would have discouraged local residency preferences in suburban Section 8 programs, which in some cases have a racially exclusionary affect. Application of Policy 38 would have discouraged communities from amending their comprehensive plans and pursuing land use and zoning policies which have had an increasingly exclusionary affect.

78. In addition to its abandonment of Policy 39 and related policies, the Met Council and the Metro HRA have almost completely failed to make use of statutory authority to develop low income housing itself. The Council and the HRA have on several occasions abandoned efforts to produce low income housing in the face of racially discriminatory community opposition. The Council has also diverted HUD low income housing funds from the Metro HRA to purposes unrelated to low income housing.

79. The Council's actions and inactions have

injured individual plaintiffs and the class in a number of ways. The Council's abandonment of policies which motivated suburban cooperation leaves those communities free to obstruct plaintiffs' intentions to seek to relocate units in white suburban communities. The Council's actions and inactions have resulted in fewer rental units in the suburbs available for use by plaintiffs with Section 8 certificates or vouchers. The Council's actions and inactions have resulted in fewer low and moderate income units available to plaintiffs in the suburbs as an alternative to waiting for years on MPHA waiting lists. The Council's actions and inactions have helped create greater concentrations of poverty in poor and segregated neighborhoods of Minneapolis, contributing to deteriorating living conditions where plaintiffs now live. Plaintiffs continue to suffer irreparable injury in all these ways.

80. The Council's actions and inactions have perpetuated and entrenched patterns of residential racial segregation in the metro area. Despite having only 16% of the metro area population, Minneapolis has 52% of the metro area's poor families of color. The disparity between the percentage of the minority population in Minneapolis and St. Paul that is poor (43.7%) and that same percentage in the suburbs (14%) is the largest of any major metro area in the country. Minneapolis had a minority population of 21.6% in 1990, whereas the suburbs had a minority population of 3%. The Council's actions and inactions have also had a

disproportionate impact on the plaintiff class in that households of color are disproportionately affected by actions which restrict choice in subsidized housing location.

81. In deliberately choosing to ignore its own legally binding rules, the Met Council knew, or reasonably should have known, that its actions would lead to less low and moderate income housing production in the suburbs, the erection of more exclusionary zoning barriers and land use practices by suburban communities, a likely halt in trends toward greater suburban integration on the part of low income minority households, and a greater polarization between wealthy white suburban communities and central cities increasingly poor and minority.

82. Defendant HUD knew, or reasonably should have known, of the Met Council's actions described herein, and the consequences which would result. Despite this, HUD has continued to fund and approve the Met Council's housing programs, without ever objecting to the Met Council's actions.

VIII. NEED FOR INJUNCTIVE RELIEF

83. Plaintiffs and the plaintiff class have no adequate remedy at law in that an award of compensatory damages will not make whole the injuries they are currently suffering due to their confinement in segregated housing, which include the loss of educational, economic and social benefits of living in an integrated community.

84. Plaintiffs and the class members have been,

and continue to be, gravely, immediately and irreparably harmed by the unlawful discriminatory acts and omissions of the defendants.

IX. CLAIMS FOR RELIEF

A. Unlawful Segregation And Racial Discrimination In The Minneapolis Public Housing Program.

85. Federal defendants (HUD, Kemp and Feeney) and local defendants (MCDA, MPHA, McCorvey, and the City of Minneapolis) have established, administered, funded, approved and failed to remedy policies and practices of unlawful *de jure* racial segregation and racial discrimination in the Public Housing Program in Minneapolis, including but not limited to the following:

a) intentional racial discrimination in the site selection and operation of Public Housing;

b) intentional racial discrimination in the selection and placement of Public Housing tenants;

c) intentional policies resulting in racially disparate levels of housing quality and services in the Public Housing Program; and

d) intentional racial discrimination in choosing to allocate Public Housing resources disproportionately to overwhelmingly white elderly highrises at the expense of Family

Housing Projects which serve a greater percentages of minority residents.

86. The policies and practices of federal defendants and local defendants in administering the Public Housing Program in Minneapolis in a racially segregated manner have also had the effect of discriminating against plaintiffs and class members.

87. Federal defendants actions in continuing to fund and approve the actions of the Met Council described herein have also had the effect of discriminating against plaintiffs and class members.

United States Constitution

88. By their actions described above, both federal defendants and local defendants have intentionally denied plaintiffs equal protection of the law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

Title VIII

89. By their actions described above, both federal defendants and local defendants have denied or otherwise made rental housing unavailable to plaintiffs, have discriminated against plaintiffs in the terms, conditions and privileges of rental housing because of plaintiffs' race, and have violated their affirmative obligation to administer programs and activities relating to housing in a manner which furthers the goals of the Fair Housing Act, Title VIII, in violation of 42 U.S.C. §§ 3604, and 3608(d) and (e)(5).

Title VI

90. By their actions described above, federal and local defendants have excluded plaintiffs from participation in, denied plaintiffs the benefits of, and subjected plaintiffs to discrimination under programs receiving federal financial assistance, because of plaintiffs' race, color or national origin, in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and regulations promulgated thereunder, 24 C.F.R. Part 1. Also, federal defendants have failed to ensure that the Public Housing Program in the City of Minneapolis was and is operated and administered in a nondiscriminatory manner. 42 U.S.C. § 2000d.

Civil Rights Laws

91. By their actions described above, both federal defendants and local defendants (acting under color of state law) have intentionally deprived plaintiffs of their right to be free from racial discrimination in the making of contracts and the leasing of real property, and have denied them the full and equal benefit of the law, in violation of 42 U.S.C. § 1981, 1982, and 1983.

United States Housing Act

92. Federal defendants have violated federal policy enacted to ensure decent housing and equal housing opportunities to all Americans as required by the United States Housing Act of 1937, 42 U.S.C. §§ 1437, 1441 and 1441a, and the Fair Housing Act of 1968, 42 U.S.C. § 3601, *et seq.*, by virtue of their failure to eradicate racial segregation

in the Public Housing Program in the City of Minneapolis. The acts and omissions of federal defendants are reviewable under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*

93. Local defendants have, under color of state law, deprived plaintiffs of their rights under the laws of the United States, including Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, and the United States Housing Act of 1937, as made actionable by 42 U.S.C. § 1983.

State and Local Law

94. By their actions described above, both federal and local defendants have violated provisions of state law, including the Minnesota Human Rights Act, Minn. Stat. § 3603.03, subd. 2, the Minneapolis Civil Rights Act, Minneapolis Code Chapter 139, and the Equal Protection Clause of the Minnesota Constitution, Article 1, Section 2.

B. Unlawful Segregation And Racial Discrimination In The Section 8 Certificate/Voucher Program.

95. Local defendants have administered their Section 8 Existing Housing Program in a manner that has perpetuated patterns of racial segregation in rental housing, and imposed a disproportionately adverse impact upon minority participants, in that minority families find it extremely difficult to use their Certificates/Vouchers outside areas of minority concentration.

96. Local defendants have reinforced patterns of

segregation in that they have failed to take the following legally required steps that would increase the opportunities for their minority Section 8 participants to live in integrated neighborhoods:

A. Defendants have failed to assist hard-to-house families in finding units, or inform them of their right to such assistance. 24 C.F.R. §§ 882.103(a) and 887.201(b).

B. Defendants have failed to provide assistance to Section 8 participants which "neither directly nor indirectly reduces the families' opportunities to choose among available units in the housing market." 24 C.F.R. §§ 882.103(b) and 887.201(b).

C. Defendants have failed to make substantial efforts to seek participation of property owners from areas outside minority concentrations, or to inform families of the opportunity to lease housing in such areas. 24 C.F.R. § 882.103(c)(1) and (2); § 882.208(a); § 887.59(c); § 887.161; § 887.163.

D. Defendants have failed to approve, or seek HUD's authorization for higher Fair Market Rents where necessary to enable minority families to rent units in integrated neighborhoods, municipalities, or localities, or to inform families they can seek such

exception rents. 24 C.F.R. § 882.106(a).

E. Defendants have failed to increase the Voucher Payment Standard to 100% of the FMRs which would enable minority families to rent units in integrated areas. 24 C.F.R. §§ 887.351 and 887.353, 42 U.S.C. § 1437f(o)(1).

97. The actions of local defendants described above have violated plaintiffs' rights under:

a. the Fair Housing Act of 1968, 42 U.S.C. §§ 3601, 3604(a), 3604(b) and 3608(e)(5), requiring that federal housing programs be administered to promote racially integrated housing, prohibiting race discrimination in the provision of rental services and facilities, and requiring that agencies administer federal housing programs and activities so as to affirmatively further the integrative purposes of the Act;

b. regulations under Title VI of the 1964 Civil Rights Act, 24 C.F.R. § 1.4(b)(2)(ii) and (6)(ii), prohibiting housing agencies from administering federal housing programs in a manner that has the effect of denying minority

persons the benefits of the program, and requiring affirmative action to overcome the consequences of conditions or past discriminatory practices that limit program benefits for minority families;

c. the Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 102(3), (1990), requiring administration of the Section 8 Program to improve housing opportunities for disadvantaged minorities on a nondiscriminatory basis;

d. Applicable federal regulations at 24 C.F.R. Parts 882 and 887 requiring agencies administering the Section 8 Existing Housing Program to achieve participation by landlords in non-minority-concentrated areas, to provide Section 8 recipients with housing opportunities outside racially-concentrated areas and present them with the full range of housing choices, and to take no action directly or indirectly to reduce a family's opportunity to choose among available

housing units;

e. the purpose of the Section 8 Program, 42 U.S.C. § 1437f(a), to promote economically mixed housing; and,

f. 42 U.S.C. § 1437f(o)(1), as interpreted in the legislative history of the Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625 (1990) and 24 C.F.R. § 887.351(b)(2), by providing Voucher Payment Standards at less than 100% of FMRs.

98. By participating with, continually funding, and knowingly permitting local defendants to continue to operate their Section 8 Existing Housing Programs in a manner which perpetuates patterns of racial segregation, federal defendants have violated the Fair Housing Act of 1968, 42 U.S.C. §§ 3601, 3604(a), 3604(b), and 3608(e)(5) and Title VI regulations located at 24 C.F.R. Part 1, requiring that federal housing programs be administered to promote racially integrated housing, prohibiting race discrimination in the provision of rental services and facilities, and requiring that HUD administer federal housing programs and activities so as to affirmatively further the integrative purposes of the Act.

99. By enacting 24 C.F.R. § 887.351(b)(2) so as to permit MPHA to establish Voucher Payment Standards at less than 100% of FMRs, federal defendants have both violated

the authorizing statute, 42 U.S.C. § 1437f(o)(1) and 5 U.S.C. §§ 702, 706; and have made it more difficult for minority Voucher holders to live in integrated areas, in violation of the Fair Housing Act, 42 U.S.C. §§ 3601, 3604(b) and 3608(c)(5).

C. Failure to Enforce Rules and Racial Discrimination by Met Council.

100. The Met Council is required to follow its own rules, whether or not it was obligated to adopt the rules. By its failure to follow its own rules, as set out in Policies 34, 38 and 39 of its Housing Guide Chapter, over the last decade, the Met Council has caused plaintiffs irreparable injury, for which they are entitled to declaratory and injunctive relief. The Council's actions have also violated Minn. Stat. § 473.173.

101. By abandoning enforcement of its Housing Guide chapter review policies and by authorizing millions of dollars of funding for sewers, roads, and schools for communities engaged in exclusionary housing practices, the Council's actions have discriminated against plaintiffs in violation of plaintiffs' rights to pursuant to 42 U.S.C. § 3604 and § 3608, Minn. Stat. § 363.03, subd. 2 and subd. 6, and the Minneapolis Civil Rights Act, Minneapolis Code Chapter 139.

102. By failing to review matters of Metropolitan significance related to metro area disparities in poverty dispensing and low income housing, the Met Council has

violated plaintiff's rights, pursuant to Minn. Stat. § 473.173.

103. By repeatedly abandoning Metro HRA suburban low income housing development in the face of racially discriminatory opposition, and by refusing to use available resources to directly develop or encourage the development of suburban low income housing, the Met Council has violated plaintiffs rights pursuant to 42 U.S.C. § 3604 and § 3608, Minn. Stat. § 363.03, subd. 2, and subd. 6, and the Minneapolis Civil Rights Act, Minneapolis Code Chapter 139.

X. REQUEST FOR RELIEF

104. **WHEREFORE**, plaintiffs respectfully request that this Court:

A. Certify this action as a class action on behalf of the class of plaintiffs pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure;

B. Pursuant to 28 U.S.C. §§ 2201 and 2202, and Rule 57 of the Federal Rules of Civil Procedure, declare that defendants' policies, practices, procedures, acts and omissions have deprived plaintiffs of their rights under the Constitution and laws of the United States and the Constitution and laws of Minnesota, as enumerated in the claims set out above.

105. Plaintiffs further request that the Court, pursuant to FED. R. CIV. P. 65, enter permanent injunctive and

other equitable relief ordering defendants to cease immediately their violations of plaintiffs' rights, and to remedy the invidious effects of their violations. Plaintiffs request that the equitable relief ordered by this Court include, but not be limited to, the following:

A. Desegregation Of Public Housing Program.

1. Providing integrated opportunities to currently segregated class members:

   a. Order federal and local defendants to provide a priority Section 8 Existing Housing Program "Equal Opportunity Housing Preference", giving exclusive access to a supply of new Section 8 Certificates/Vouchers along with necessary housing counseling services, to all minority households currently residing in segregated MPHA Public Housing Projects and units, and to all minority households on the MPHA waiting lists, in order to ensure that such households receive opportunities for integrated housing;

   b. Order federal defendants to allocate and make available additional Section 8 Existing Housing Program certificates and vouchers to those households referred to in paragraph

(1)(a) above, for use in areas outside of minority concentration in the Minneapolis-St. Paul metropolitan area, in a number sufficient to achieve desegregation;

2. Ensuring that current and future Public Housing Projects become racially integrated and equalized in conditions:

   a. Order that defendant MPHA submit an application, and that HUD approve such application, calling for demolition of family rowhouse units on the Northside, as well as certain scattered site units, in sufficient numbers to fundamentally alter and improve the livability of the remaining project, ensure that units will not become physically obsolete in the future, and ensure that remaining units will be substantially deconcentrated;

   b. Order federal and local defendants to produce and then implement a plan designed to redevelop the Northside Family Projects site following demolition, so as to provide that the remaining public housing units will be improved, provided with sufficient

amenities, and linked to surrounding neighborhood commercial and social services and access to employment in sufficient manner so as to provide conditions equal to those of neighborhoods outside of minority concentrations, and to ensure access to services sufficient to undo the deleterious effects of residing in segregated, concentrated, isolated conditions.

c. Order federal and local defendants to implement, administer and enforce tenant selection and assignment policies and transfer policies and procedures which remedy racial segregation and discrimination;

d. Order federal and local defendants to place all future new public housing units, or units which are replacing public housing units regardless of program, in areas outside of minority concentrations, including suburban areas, modifying, if necessary, federal cost limitations and other policy limitations which may make it difficult to find qualifying units in

such areas;

3. Remedying the injury of segregation for those class members who desire to remain in previously segregated locations, by equalizing their living conditions with those of integrated locations, by ordering federal and local defendants to fund and to rehabilitate, modernize, improve and make safe to the extent needed, all of MPHA's identifiably minority Public Housing Projects, including Scattered Site units in areas of minority concentration, and the immediate surrounding neighborhoods.

B. Desegregation of Section 8 Existing Housing Program.

1. Providing assistance to program participants to locate in areas outside minority concentration:

   a. order local defendants to provide all assistance necessary to participants, including, transportation, escort services, childcare, information on integrated neighborhoods, and assistance in filing discrimination complaints;

b. direct defendants to request and approve, wherever necessary, 10 and 20 percent FMR exceptions to enable Section 8 participants to rent units in integrated areas, and to inform all participants of their right to seek such exception rents;

2. Authorizing Section 8 participants to rent units with rents sufficiently high to permit participants to find units in integrated areas:

a. direct defendants to set the Voucher Payment Standard at 100 percent of the Minneapolis-St. Paul Metropolitan area FMR;

b. direct defendants to request and approve, wherever necessary, 10 and 20 percent FMR exceptions to enable Section 8 participants to rent units in integrated areas, and to inform all participants of their right to seek such exception rents;

c. authorizing minority Certificate-holders interested in living outside minority-concentrated areas of Minneapolis to pay reasonable rents

above the FMR;

3. Increasing landlord participation by ordering defendants to aggressively recruit landlords of rental property located in areas outside of minority concentration in Minneapolis and throughout the Twin Cities metropolitan area.

4. Ceasing all actions that directly or indirectly reduce a minority Section 8 participant's opportunity to choose housing units outside minority concentrated areas of Minneapolis.

C. Additional Federal Government Duties.

1. Order federal defendants to direct all Twin Cities Metropolitan Area HRAs and PHAs which administer, the Section 8 Existing Housing Program to eliminate any non-federal local residency preferences with respect to all households currently on their waiting list and all future applicants in order to ensure that such preferences do not create a barrrier to non-resident classs members seeking to enter the community;

2. Order federal defendants to direct the creation of one unified waiting list and application procedure for all federally subsidized low-income housing projects througout the Twin City Metropolitan area, including the Section

8 Certificate and Voucher Programs, in order to ensure that applicants can apply at one location and be considered for all low-income housing in the metro area for which they desire to apply;

3. Order federal defendants to condition all funding and grants, including but not limited to, funds for the CDBG, HOPE, HOME, McKinney Act and Comprehensive Grant programs, made to all local defendants, upon defendants' compliance with federal and state fair housing laws and the relief ordered by this Court;

4. Order federal defendants to take all other steps necessary to ensure the other defendants' immediate compliance with the relief orded by this Court.

D. Relief as to Met Council.

1. Order the Met Council to apply and enforce Housing Guide Chapter Policiies 34, 38 and 39, as well as any other relevant housing policies, to all applications of any kind for state or local funds by all jurisdictions within the metro area, and to apply review procedures to suburban performance in cooperating with MPHA efforts to replace public housing units for plaintiff class

members in suburban areas.

2. Order the Met Council to develop an acceptable plan to remedy its past failures to apply Policies 34, 38 and 39 to local governments with exclusionary land use and development policies and/or poor records in providing affordable housing by trying all future funding recommendations for such localities to abolition of exclusionary policies; the abolition of residency preferences for state and federal low income housing programs; setting goals for production of affordable housing; and making reasonable progress toward achievement of those goals;

3. Order the Met Council to develop an assessment of Metropolitan Council and Metro HRA resources available and necessary to remedy past failure to use such resources to encourage the development of suburban low income housing as well as an acceptable plan for the use of such funds to encourage the development of suburban low income housing units.

4. Order the Met Council, through the Metropolitan HRA, to:

   a. Submit an application to HUD for funds to develop a sufficient number

of scattered site public housing units in the suburbs to remedy its past failure to develop such units; and

b. Develop plans and policies to assure that low income minority residents of Minneapolis have an opportunity to occupy a significant number of such units.

5. Order the Met Council, through the Metro HRA, to cooperate in creating a metro-wide unified application procedure for low income housing, as provided for in paragraph 105C2 herein.

E. Future Relief.

1. Order that defendants make use of resources from any newly created low-income housing programs, and apply for any and all relevant funding which may be available, whether on the federal, state, or local level, to the extent necessary to remedy the legal violations set out herein;

2. Order that the Court will retain jurisdiction and that all defendants shall periodically report to plaintiffs' counsel on their efforts to comply with the Court's judgment;

106. For further relief, plaintiffs request that the Court also:

A. Award to each of the individual named

plaintiffs, pursuant to 42 U.S.C. §§ 1983 and 3613(c)(1), compensatory damages against local defendants in amounts determined appropriate by the Court;

B. Award to plaintiffs, pursuant to 42 U.S.C. §§ 1988 and 3613(c)(2), 28 U.S.C. § 2412, and 28 U.S.C. § 1920, reasonable attorneys' fees and expenses, costs, and disbursements of the action;

C. Pursuant to FED R. CIV. P. 53, appoint a special master to implement and administer the relief ordered by this Court;

D. Order any and all other relief this Court deems proper under the circumstances.

LAW OFFICES OF THE LEGAL AID SOCIETY OF MINNEAPOLIS

Dated: 2/22, 1994

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Dated: 2/22, 1994

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EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Lucy Hollman, Shirlnice Givens, Mai Yang, Charlotte Brown, Vanessa Boateng, Lia Shoua Pha, Anne Balentine, Josephine Hill, Joyce Charles, Her Hang, Marlene Halloway, Patricia Scott, Gertrude Marks, Michelle Barnes, Earline Robertson, Jacqueline Trass, and Lawrence M dison, on behalf of themselves and all others similarly situated, and the Minneapolis Branch of the National Association for the Advancement of Colored People (NAACP),

Plaintiffs,

v.

CONSENT DECREE
Civil 4-92-712

Henry Cisneros, in his official capacity as Secretary of the

Department of Housing and
Urban Development ("HUD");
Thomas T. Feeney, in his
official capacity as Acting Minnesota
State Coordinator of HUD; Cora
McCorvey, in her official capacity
as Executive Director of the Minneapolis
Public Housing Authority ("MPHA"),
MPHA, in and for the City of Minneapolis,
a public body corporate and politic;
the Minneapolis Community
Development Agency ("MCDA"), a
public body corporate and politic;
the Metropolitan Council ("Metro
Council"); Curtis W. Johnson, in his official
capacity as Chair of Metro Council; and
Thomas McElveen, in his official capacity
as Manager of Metropolitan Council
Housing and Redevelopment Authority
unit ("Metro HRA"),
Defendants
Cora McCorvey, in hr official capacity as
Executive Director of the MPHA; MPHA; MCDA,
and the City of Minneapolis,
Defendant Cross-Claimants,
v.
Henry Cisneros, in his official capacity as

Secretary of the Department of ("HUD");
Thomas T. Feeney, in his official
capacity as Acting Minnesota State
Coordinator of HUD; Curtis W. Johnson,
in his official capacity as Chair of
Metro Council; and Thomas McElveen,
in his official capacity as Manager of
Metropolitan Council Housing and
Redevelopment Authority unit ("Metro HRA"),
Defendants.

I. INTRODUCTION

1. Plaintiffs Lucy Hollman, *et al.*, ("Individual Plaintiffs") and Plaintiff National Association for the Advancement of Colored People (NAACP), and Defendants Henry Cisneros, Thomas T. Feeney, the United States Department of Housing and Urban Development (HUD) ("federal Defendants"), Cora McCorvey, the Minneapolis Public Housing Authority (MPHA), the Minneapolis Community Development Agency (MCDA), the City of Minneapolis ("Minneapolis Defendants"), and the Metropolitan Council, Curtis W. Johnson, and Thomas McElveen ("Metropolitan Defendants"), enter into this Consent Decree ("Decree") for the purpose of settling this lawsuit.

2. Plaintiffs initiated this action alleging that Minneapolis and federal Defendants have administered the

Public Housing and Section 8 Existing Housing programs in Minneapolis so as to create and perpetuate patterns of racial segregation, in violation of the United States Constitution, and federal and state laws. Subsequently, Plaintiffs added Metropolitan Defendants to the case, alleging the Metropolitan Defendants abandoned efforts to encourage the spread of low-income housing throughout the metropolitan area in violation of the law, thus making it more difficult for Plaintiffs to effectuate relief in this case on a metropolitan area-wide basis. Minneapolis Defendants then filed cross claims of a similar nature against Metropolitan Defendants, as well as filing cross claims against federal Defendants. Defendants deny all claims and cross claims.

3. The parties have entered into this Decree to address the issues raised in the Plaintiffs' complaint and the Minneapolis Defendants' cross claims, and to avoid the expense and inconvenience of further litigation. The purpose of this Decree is to set out a series of actions to be taken by Defendants which will promote equal housing opportunity, expand and maximize geographic choice in assisted housing, and encourage racial integration, by (1) deconcentrating racially concentrated family public housing projects, (2) improving living conditions in remaining family public housing units, (3) relocating public housing units to areas outside of minority concentrations, (4) improving administration of the Section 8 Existing Housing program so as to remove barriers to effective choice, (5) expanding access

to application opportunities for assisted housing, (6) developing means to encourage expansion of low-income housing opportunities in suburban cities in the metropolitan area, and (7) ensuring Defendants remain committed to preserving and expanding locational choice and the goals of fair housing. Through this Decree the parties seek to expand access to assisted housing not only in areas outside of minority-and poverty-concentration in Minneapolis, but in such areas throughout the Minneapolis-St. Paul Metropolitan Area.

4. The parties have agreed to the terms set forth below and have agreed to the entry and implementation of this Decree. Therefore, based on the agreement of the parties, and all materials submitted to the Court on the appropriateness of the relief set forth in this Decree, it is ordered, adjudged and decreed that the parties shall be bound to undertake the obligations set out below.

II. DEFINITIONS

5. Family Public Housing means public housing owned by the MPHA and specified herein as Mn 2-1, Glendale Apartments; Mn 2-2, Olson Apartments, excluding the Bryant Highrise; Mn 2-3, Lyndale Apartments, excluding 800 North 5th Street Highrise; Mn 2-4, Glenwood Apartments; Mn 2-5, Sumner Field Homes;

Mn 2-7, Sumner Annex; Mn 2-25B, Near North Apartments; Mn 2-13, Mn 2-38, Mn 2-39, Mn 2-40, Mn 2-43, Mn 2-44, Mn 2-45, Mn 2-47, Mn 2-48, scattered site projects; including replacement units for Mn 2-2, Mn 2-3, and Mn 2-5 that are in existence as of the date of this Decree.

6. Federal Defendants means Henry Cisneros in his official capacity as Secretary of HUD, and Thomas T. Feeney, in his official capacity as Acting Minnesota State Coordinator of HUD, as well as their successors during the life of this Decree. "Action" as used when referencing HUD shall include non-action.

7. Metropolitan Defendants means the Metropolitan Council established by MINN.STAT. § 473.123, subd. 1, Curtis W. Johnson in his official capacity as Chair of the Metropolitan Council, and Thomas McElveen in his official capacity as manager of the Metropolitan Council Housing and Redevelopment Authority Unit, as well as their successors during the life of this Decree.

8. Minneapolis Defendants means Cora McCorvey, in her official capacity as Executive Director of the Minneapolis Public Housing Authority (MPHA) as well as her

successor during the life of this Decree; the MPHA, in and for the City of Minneapolis, a public body corporate and politic; the Minneapolis Community Development Agency (MCDA), a public body corporate and politic; and the City of Minneapolis, a public body corporate and politic.

9. Minneapolis-St. Paul Metropolitan Area or Metropolitan Area means the counties of Anoka, Carver, Dakota excluding the City of Northfield, Hennepin excluding the City of Hanover, Ramsey, Scott excluding the City of New Prague, and Washington. Unless otherwise indicated by the context of this Decree, the term "Metropolitan Area" does not mean the Metropolitan Statistical Area ("MSA" or "SMSA") defined by the Office of Management and Budget.

10. Minority means a person other than a non-Hispanic white.

11. Minority Concentrated Area means: any census tract in the Metropolitan Area with a minority population which is twenty percentage points greater than the percentage of minority population in the Minneapolis-St. Paul Metropolitan Statistical Area (MSA). Until new census data becomes available, any

census tract with a minority population greater than 28.69% is a minority concentrated area. As soon as new census data becomes available, the parties shall revise the definition of minority-concentrated areas to comply with the definition set out above.

12. Multi-Family Housing means a residential building containing more than four dwelling units.

13. Nonconcentrated Area means any census tract within the City of Minneapolis or the remainder of the Metropolitan Area which is not minority-concentrated or poverty-concentrated.

14. Northside Projects means MPHA family public housing projects in the Near Northside of Minneapolis, consisting of Mn 2-2, Olson Apartments, excluding the Bryant Highrise; Mn 2-3, Lyndale Apartments, excluding 800 North 5th Street Highrise; Mn 2-4, Glenwood Apartments; Mn 2-5, Sumner Field Homes; Mn 2-7, Sumner Annex; Mn 2-25B, Near North Apartments; and other scattered site units in the immediate vicinity of the Sumner-Glenwood area.

15. Parties means all the Plaintiffs and all the Defendants in this action, as listed in the

caption to the Decree.

16. Poverty Concentrated Area means: (1) in Minneapolis or St. Paul, a census tract with a population at or below poverty which is fifteen percentage points greater than the percentage of population below poverty in the City. Until new census data becomes available, Minneapolis census tracts with a population at or below poverty of at least 33.5% of the census tract population and St. Paul tracts with a poverty population of at least 31.7% of the tract population are poverty-concentrated areas. (2) In the suburbs, a census tract with a poverty population which is one and a half times greater than the percentage of population below poverty in the Metropolitan Area as a whole are poverty concentrated areas. Until new census data becomes available, suburban census tracts with a poverty population of at least 12.2% of the census tract population are poverty-concentrated areas. As soon as new census data becomes available, the parties shall revise the definition of poverty concentrated areas to comply with the definition set out above.

17. Project-Based Low-Income Housing means

housing in which the subsidy enabling the tenant's housing cost to be set at no more than 30% of the tenant's income remains attached to the building even if the current tenant moves.

18. Scattered Site Units means family public housing units which are scattered throughout a particular city of the Metropolitan Area, rather than being part of a large multi-unit apartment or other complex.

19. Single Family Housing means buildings of one to four residential units.

20. Suburbs means all cities, towns, and other units of general local government, other than the cities of Minneapolis and St. Paul, located within the Metropolitan Area as defined in Paragraph 9.

21. Section 8 certificate or Certificate means either a Section 8 Certificate or a Section 8 Voucher under Section 8 of the United States Housing Act, 42 U.S.C. § 1437f.

III. DECONCENTRATION AND IMPROVEMENT OF NORTHSIDE PROJECTS

A. Demolition and/or Dispositon

22. Defendant MPHA will submit two applications

for demolition and/or disposition and replacement of 770 public housing units in two phases. The first application will be done promptly and will include 402 units in the first phase: the Sumner Field project, projects Mn 2-5 and 2-7, currently consisting of 350 units; 4 units located in the Glenwood Project; and 48 scattered site units detailed in IV below. The first phase demolition and/or disposition will be completed three years from the date of HUD approval of the phase I application.

The second phase will consist of the units in the Glenwood Project, Mn 2-4, currently consisting of 220 units (less the 4 in the first phase); the Olson Project excluding the Bryant Highrise, Mn 2-2, currently consisting of 66 units; the Lyndale Project excluding the 800 N. 5th St. Highrise, Mn 2-3, consisting of 86 units. This application will be submitted to HUD within six months and in any event before September 30, 1995. The second phase demolition and/or disposition may begin before the first is completed and will be completed within five years of entry of the Decree.

These applications shall be provided to Plaintiffs for comments before submission to HUD.

23. HUD will promptly process, and shall approve the applications unless they fail to meet the applicable statutory standards.

24. Within three months of entry of the Decree, Defendant MPHA and Plaintiffs will agree to a plan for demoliton of Sumner Field which will coordinate the

demoliton, relocation, and development of replacement housing in order to achieve the following goals: development of replacement housing as quickly as possible, provision of relocation certifcates as soon as a mobility housing counseling program can be effectively established, phasing of demolition so as to minimize the time in which units otherwise available for occupancy are vacant, and phasing of demolition so as to ensure that the remaining project constitutes a viable and safe environment for its residents.

25. MPHA and HUD agree that they will promptly take all steps necesssary to comply with federal law with respect to the status of the Sumner Field Project as a property potentially eligible for inclusion on the National Register of Historic Places.

26. HUD agrees that Northside Project land made vacant by demolition may be disposed of by MPHA at substantial writedown, consistent with the re-use of the property as ultimately determined herein.

27. The MPHA and MCDA agree that they will promptly undertake, in conjunction with residents and organizations in the affected Northside community, a study process to develop a comprehensive plan for reuse of the Sumner Field site and any additional land vacated by second phase demolition. The planning process will be coordinated with the Minneapolis Neighborhood Revitalization Program (NRP) planning process for this area to the extent feasible. The MPHA has contracted with the Design Center for the

American Urban Landscape of the University of Minnesota to provide technical assistance in this process. The planning process will be completed within two years of entry of the Decree and will consider the following:

a. alternative uses, including:
   (1) park recreational and/or wetland areas;
   (2) mixed income housing and/or owner-occupant opportunities; and
   (3) commercial and industrial uses which create the potential for jobs for class members and other low-income residents of the area.

b. the need for buffers to separate residences from highways and industrial uses.

c. the extent to which connections to and reintroduction of commercial services to the area and the surrounding community are necessary and feasible.

d. the extent to which changes in public services, including police, transportation and social services are necessary to reduce the isolation of the area and produce a more viable neighborhood. Particular attention should be paid to means to enahance residents' sense of personal security from crime.

e. whether to provide for the re-introduction of streets through and subdivision of the "superblock" area west of the site area.

B. Relocation

28. Residents of units scheduled for demolition will be relocated by Defendant MPHA in a manner which provides the residents with as wide as possible a geographic choice of where to live. Where possible, permanent replacement units will be created prior to scheduled demolition so that persons to be relocated may move directly into replacement housing. Persons moving into scattered site public housing units in nonconcentrated areas, will receive counseling to enable them to achieve a successful transition into such neighborhoods. In addition, Defendant MPHA will provide information to neighborhood residents to facilitate their acceptance of replacement housing.

29. When MPHA residents must be relocated due to pending demolition and permanent replacement units are not yet available, such residents shall be provided with Section 8 certificates (relocation certificates) to enable them to relocate, along with housing mobility counseling services, described in paragraph 70 herein, in order to provide the opportunity to move to non-concentrated areas. Following completion of counseling services, residents using relocations certificates shall be free to use their certificates to move to any location they desire, subject to federal statutory and regulatory laws governing the Section 8 Existing Housing

Program.

30. Persons who receive relocation certificates because of permanent replacement units are not yet available, shall be offered permanent replacement units when such units do become available. In the event a person chooses to move into a permanent replacement unit, the relocation certificate shall be returned to the pool of relocation and mobility certificates described herein in paragraph 64.

31. The MPHA will pursue strategies to maximize homeownership opportunities for persons relocated.

C. Replacement Housing and Metropolitan Mobility Incentive Housing

1. Resourees and Statutory Requirements

32. Within two weeks after Court approval of this Decree, HUD will submit to MPHA an Annual Contributions Contract (ACC) for development of 770 units of public housing. These units will either replace public housing units demolished pursuant to III.A. or will be used to provide incentives to other PHAs to accept replacement units located in nonconcentrated areas as set out in paragraph 37 below. Units provided as incentives to other PHAs will not be required to provide a priority to applicants from the MPHA waiting list and will not count as replacement units pursuant to 42 U.S.C. § 1437p. Replacement units may be located either in Minneapolis or in the Metropolitan Area suburbs. All replacement units will give priority to applicants on the

MPHA waiting list.

33. The MPHA will submit, as part of its disposition application, and HUD will approve a replacement housing plan which will permit the MPHA to count as replacement housing for purposes of 42 U.S.C. § 1437p a portion of the 900 section 8 tenant based certificates to be provided pursuant to paragraph 61, up to the statutory maximum of 50% of the units to be demolished or disposed of.

34. The Sumner Field Units and all scattered site units to be disposed of pursuant to IV will be replaced with tenant based Section 8 certificates or with public housing located in nonconcentrated areas as set out in III.C.2. below. The remaining units to be demolished will either be replaced in nonconcentrated areas as set out in III.C.2. below or at or adjacent to the current site of the four Northside Projects, to be determined pursuant to the planning process set out in III.C.3. below.

2. Replacement in nonconcentrated areas.

35. All of the project based replacement units for the Sumner Field Project, scattered site public housing, and the replacement units for the Glenwood, Olson, and Lyndale Projects which are not to be located on current Northside Project sites pursuant to III.C.3. below will be located in nonconcentrated areas of Minneapolis and Metropolitan Area suburban locations. No less than 80 of these units will be replaced in Minneapolis. New construction replacement units

will be located within the Metropolitan Urban Services Area or within Free Standing Growth Centers as those terms are defined in the Metropolitan Council's Regional Blueprint.

36. In the course of implementing the replacement housing plan, MPHA will solicit suburban housing authorities and other local government units, and contract with such authorities or units as necessary, in order to place replacement scattered site public housing in the suburban Metropolitan Area.

37. MPHA may offer a portion of the 770 public housing development units provided by HUD pursuant to III.A. above to suburban jurisdictions as an incentive to accept MPHA replacement units in those suburban jurisdictions. These incentive units need not give priority to applicants from the MPHA waiting list. The number of units offered as suburban incentives will not exceed the number of tenant based certificates counted as replacement housing and will not exceed 203 without Plaintiffs' and HUD's written consent.

38. Defendant MPHA will focus its replacement housing efforts on acquisition of existing single family units with modest rehabilitation requirements, including single family property disposition units, although appropriate HUD multifamily property disposition projects also may be considered. These efforts also will explore the feasibility of new construction of smaller multifamily buildings. Replacement will focus on units with bedroom sizes

approximating the needs of MPHA applicant and transfer waiting lists. With respect to any multifamily properties acquired as replacement housing, or with respect to newly constructed or rehabilitated multifamily units used for replacement housing the following restrictions shall apply: for projects containing 100 or fewer dwelling units, no more than ten (10) units shall be replacement units; for projects containing more than 100 dwelling units, no more than ten (10) percent of the units or 35 units, whichever is less, shall be replacement units. MPHA, however, will not use federal funds toward acquiring dwelling units that will not be made available as public housing units.

39. Persons displaced or scheduled for displacement by demolition of units in which they were residing shall have first priority for replacement units regardless of where such units are located in the Metropolitan Area. Second priority shall be given eligible persons on Defendant MPHA applicant and transfer waiting lists who reside in minority or poverty concentrated areas, regardless of where such units are located in the Metropolitan Area. Third priority shall be given all other eligible persons on Defendant MPHA applicant and transfer waiting lists.

40. HUD, in connection with the above 770 public housing replacement units, will consider waiver of applicable HUD Total Development Cost (TDC) caps and will grant such waivers only to the extent of increased acquisition cost of housing of modest design in nonconcentrated areas.

41. HUD will make FHA single family or multifamily property disposition units available to the Minneapolis Defendants only in accordance with applicable HUD regulations and procedures.

42. HUD agrees that MPHA may proceed with developing replacement housing immediately upon approval of the demolition/disposition application, and that such activity need not wait until the demolition of units is accomplished.

43. HUD agrees that in the event MPHA and a suburban PHA enter into a joint powers agreement under which the suburban PHA develops or manages replacement housing in the form of scattered site public housing, MPHA shall not be required to take bids for the development or management of the replacement housing.

44. Replacement housing shall be completed by MPHA and available for occupancy within six years of HUD approval of the demolition or disposition application. MPHA shall make all reasonable efforts to phase in completion of the replacement housing over the course of the six year periord so that most of the replacement units are complete prior to the end of the six years.

3. Redevelopment Of Olson, Glenwood, and Lyndale Project Site.

45. The MPHA will promptly enter into a planning process with the residents, resident organizations, social service providers and other affected community groups in the

Glenwood, Lyndale, and Olson Projects, the Golden Age Apartments, and the scattered site units located on Smith Circle to develop a plan for these projects. This plan will consider to what extent replacement should take place on the current site, how any resulting vacant land should be re-used, and how any public housing replaced on site can be improved to better meet resident needs. The MPHA has contracted with the Design Center for American Urban Landscape to provide technical assistance in this process and the Design Center's preliminary evaluation of the projects will be used as a starting point in the planning process. The Plaintiffs will be integrally involved in this planning process. The process will be coordinated with Minneapolis Neighborhood Revitalization Program (NRP) planning for this area and will be completed within two years of entry of the Decree.

46. HUD will approve replacement of up to 368 units on the current sites as meeting the "overriding need" standard in 24 C.F.R. § 941.202 (c)(1)(ii) based on the representations of neighborhood redevelopment and revitalization made by the Minneapolis Defendants and the participation of the Plaintiff class and other tenants in the formulation of a redevelopment and revitalization plan.

47. HUD and the MPHA will attempt to find ways to replace units on the current site through substantial rehabilitation of existing units.

48. HUD agrees that Northside Project land made vacant by demolition may be disposed of by MPHA a

substantial write down, consistent with re-use of the property as ultimately determined herein.

D. Action Plan

49. HUD will explore with MPHA how to provide at least $175,000 to carry out the studies of reuse of the Sumner Field site and the study of replacement of the Glenwood, Lyndale and Olson projects, including authorizing the use of development funds, so long as that will not require an increase in the amount of HUD funding for the ACC and is permitted by law..

50. Based upon both studies, Minneapolis Defendants will produce an action plan which will provide for the restructuring of the Smith Circle, Golden Age, Glenwood, Lyndale and Olson projects, and redevelopment of the Sumner Field site as well as any vacant land resulting from second phase demolition, to be presented to the parties within two years of entry of the Decree.

51. Subject to the dispute resolution procedure set out in paragraph 97, any party may petition the Court to review the action plan. In determining the adequacy of the action plan, the Court shall find the plan invalid to the extent that it is not reasonably calculated to achieve the goals set out in subparagraph A below or fails to fully consider the factors set out in subparagraph B below or omits information required by subparagraph C below. In the event the Court invalidates any aspect of the plan, the Minneapolis Defendants shall amend the plan as required by the Court.

A. The goals which the plan must be reasonably calculated to achieve are the following:

i. substantial deconcentration of the Northside Projects;

ii. improved physical integration of the Northside Projects with the surrounding communities;

iii. redevelopment of the area into a more viable neighborhood with improved housing quality, social and other services, economic opportunity, and amenities comparable to those found in family subsidized housing located in predominately white metropolitan-area neighborhoods, including re-use of vacant land as described in paragraph 27; and

iv. providing housing in a variety of locations for low-income families on the MPHA's waiting lists.

v. Responsiveness to the expressed preferences of current and prospective

residents regarding housing type and location.

B. The planning process must fully consider the following issues:

i. Desirable numbers of public housing units to remain on the site in light of

a. the goals set out above:

b. sound design principles for maximizing resident satisfaction, privacy, responsibility, stability and security in multifamily housing;

c. ability of the MPHA's housing stock to meet the needs of current residents and applicants in a variety of locations, especially those that are racially and economically integrated.

d. Preferences of current and prospective residents regarding housing location.

ii. Desirable locations and bedroom sizes for replacement units.

iii. Desirable design improvements and levels of rehabilitation and modernization.

iv. Desirable amenity levels, including the desirability and feasibility of providing amenities in individual units beyond those normally provided in public housing in order to increase racial and economic integration.

v. Needed public services and social services.

vi. Needed management improvements and desirable management innovations, including study of a self-management option.

vii. Potential for homeownership, either on site or as an individual option for residents who choose to leave the site.

viii. The potential for development of mixed income housing.

ix. To the extent that recommendations produced suggest additional demolition resulting in developable parcels, the study will be expanded to include surrounding community organizations and will recommend reuses for the developable parcels. This process will be coordinated with that described in paragraph 27 (First Phase above) and will address the same issues.

x. The plan will set out a timetable for removal and replacement of all units designated to be demolished and strategies to minimize the amount of time involved in occupying replacement units and to provide for maintenance of remaining housing and grounds to provide a safe, sanitary and decent living environment during the phased removal and replacement of units.

xi. Long term viability of the remaining units, given the soil conditions and measures necessary to mitigate the

effects of adverse soil conditions on common areas and individual units.

C. The plan shall identify the cost of each aspect of the plan, identify the source and type of funds which will be required to effectuate the plan, and indicate a schedule for completing the plan.

52. With respect to the cost of implementation of the plan, the MPHA will make available up to $2,500,000 of year five and six Comprehensive Grant Funds for demolition, and provision of amenities. HUD will be responsible only for funding the 770 units of public housing and will not be required by this Decree to fund any other elements of the plan. (This provision does not limit HUD's responsibility for funding the planning activities as described above and for funding other activities specifically set forth in parts V, VI, and VIII of this Consent Decree). HUD will approve demolition or disposition of units in the Golden Age project and scattered site units on Smith Circle as indicated by the plan unless the applications fail to meet the applicable statutory standards. The Minneapolis Defendants shall be obligated to provide only such funding as is necessary for their compliance with their obligations with respect to preparation or implementation of the action plan.

53. Once the action plan is presented to the parties

and the parties have had thirty (30) days to present objections or comments, Minneapolis Defendants shall implement the plan according to the schedule set out in the plan.

54. During and following implementation of the action plan, and subject to the dispute resolution procedure set out in paragraph 97, any party may seek the Court's review in the event those persons or entities carrying out the plan depart from the plan, fail to effectuate all aspects of the plan, or lag behind the timetable set out in the plan.

IV. DECONCENTRATION OF SCATTERED SITE UNITS

55. MPHA agrees to evaluate 129 of its 376 scattered site units which are in minority concentrated areas for possible demolition/disposition. These 129 units were generally built before 1970 or have not received major modernization work within the past five years, and are the units most likely to need lead paint abatement and substantial rehabilitation.

56. The MPHA has adopted a policy, set out in Appendix A, under which units being evaluated will be demolished or otherwise disposed of if the cost of lead paint treatment and required modernization is substantial and unless the units after lead paint treatment and modernization are especially desirable for some other reason, such as large bedroom size or high amenity level. Any such units that are

demolished or otherwise disposed of will be replaced in Nonconcentrated Areas. In addition to the commitments made by MPHA in the preceding sentences regarding the location of replacement scattered site units, MPHA agrees that any non-replacement scattered site units developed in the future by MPHA will not be located in poverty-concentrated areas and will in general not be located in areas which are minority-concentrated. Nothing in this paragraph shall be deemed to constitute a waiver of HUD's right under applicable law to review and approve or disapprove sites proposed by the MPHA.

57. The MPHA estimates that application of this policy will result in approximately 100 units located in minority concentrated areas being replaced in non-concentrated areas. To date, 44 units have been submitted to HUD for demolition or disposition. HUD has approved demolition or disposition of 19 of these. The remaining 25 will be resubmitted to HUD along with an additional 23 units as part of the 770 unit package referred to in part III. Demolition/disposition applications for all scattered site units referred to in paragraph 56 above shall be submitted to HUD, after providing plaintiffs with copies and the opportunity to comment, by no later than two years from entry of the Decree. HUD shall approve all disposition or demolition applications consistent with this policy unless the applications fail to meet applicable statutory standards.

58. HUD agrees that scattered sites may be turned

over to the MCDA or nonprofit developers at no cost in order to foster homeownership or similar public policies intended to ensure long term ownership of the premises and avoid the kind of absentee ownership which may lead to neglect.

59. Demolition/disposition of scattered site units and production of replacement units shall be coordinated so as to minimize the period of time between demolition/disposition and the initial operation of replacement units. All replacement units will give priority to MPHA tenants and applicants. Paragraphs 28, 31, and 35 herein applicable to first phase demolition, relocation and replacement shall also be applicable to demolition/disposition of scattered site units herein.

V. METROPOLITAN AREA FAIR HOUSING INITIATIVE

60. The parties intend the provisions of this Decree to serve as a demonstration program in order to provide a national model for deconcentrating public housing and maximizing geographic choice throughout a metropolitan area. To that end, HUD will become a co-sponsor of this initiative as described herein, cooperate with the other parties in developing and implementing the policies set out below, and will provide the substantial funding described in paragraphs 32, 61, 69 and 74.

61. Within two weeks after entry of the Decree,

HUD shall provide an Annual Contributions Contract amendment for funding an additional 600 tenant-based Section 8 certificates and 300 tenant based Section 8 Vouchers (hereinafter referred to as Certificates), for relocation and mobility purposes, to Defendant MPHA. From this pool of certificates, MPHA shall provide residents of units scheduled for first phase demolition such certificates, known as relocation certificates, for all such residents for who acceptable permanent replacement units are not available.

62. Following the receipt of housing counseling services as described in paragraph 70, persons receiving Section 8 relocation certificates shall be free to use their certificates throughout Minneapolis and the Metropolitan Area, subject only to federal statutory and regulatory laws governing the Section 8 Existing Housing Certificate and Voucher Programs.

63. All remaining certificates in the pool of 900 shall be designated mobility certificates. Mobility certificates are provided for the express purpose of enabling pubic housing residents living in public housing in areas of minority and poverty concentration to move to nonconcentrated areas. These certificates, along with housing counseling services, shall be offered to public housing residents currently living in either family rowhouse units or scattered site units which are located in areas of minority or poverty concentration and which are not already subject to the offer of a relocation certificate pursuant to demolition. Following completion of

housing counseling services, certificate holders will be allowed 180 days to enter into a lease for the rental of a unit in a nonconcentrated area. At the expiration of the 180 days, if the certificate holder has received an offer of housing in a nonconcentrated area facilitated by the housing counseling service and a Housing Assistance Payments Contract or a Housing Voucher Contract has not been executed, the certificate will be returned for distribution to other public housing residents. In the event a certificate holder has not received an offer of housing in a nonconcentrated area facilitated by the housing counseling service the certificate may be retained by the holder until such an offer has been received. The same restrictions shall apply to any reuse of the certificates (i.e., turnovers); however, if the reuse is by the certificate holder after having resided in a unit in a nonconcentrated area for one year, the restriction shall not apply.

64. In the event some mobility certificates remain unused after offers are extended to all current MPHA residents as described in paragraph 63 above, the remaining mobility certificates will be offered to MPHA's waiting list for public housing with priority given to households with children living in minority-or poverty-concentrated areas. In the event relocation or mobility certificate holders subsequently give up their certificate, such certificate shall be returned to the pool of 900 certificates to be used first for relocation of residents subject to subsequent

demolition/disposition, and secondly, as a mobility certificate for MPHA's waitlist, with priority given to households with children living in minority-or poverty-concentrated areas..

65. First priority for mobility certificates shall go to Plaintiffs Lucy Hollman, Shirlnice Givens, Mai Yang, Charlotte Brown, Vanessa Boateng, Joyce Charles, Josephine Hill, Lia Shoua Pha, Anne Balentine, and Her Hang. These named plaintiffs shall be eligible for mobility certificates as long as they meet income eligibility rules, regardless of whether they currently live in public housing or in minority- or poverty-concentrated areas. After that, eligible public housing residents shall receive certificates pursuant to paragraphs 63 and 64 above in the order of their seniority within MPHA public housing, with those residing in MPHA public housing units the longest receiving certificates first.

66. The parties agree that for the purpose of determining fair share allocations of Section 8 resources in future years, the allocation of 900 certificates described herein will be in addition to the fair share allocation which MPHA and the Metropolitan Council would normally receive pursuant to 24 C.F.R. Parts 791, 882 and 887. In determining the Metropolitan Council's and the MPHA's fair share allocations in future years, the parties agree that mobility certificates shall not be considered part of the allocation on which Minneapolis and the Metropolitan Council are normally judged, due to the unique purpose of these certificates.

67. Within 90 days of entry of the Decree, Plaintiffs and MPHA shall enter into an agreement defining the timing of distribution of certificates and housing conseling services to those entitled to relocation certificates, mobility certificates, and current holders of Section 8 certificates who will be entitled to counseling services.

68. Except to the extent barred by law, HUD, when it enters into any new or renewed contract to provide any form of HUD assistance to owners or managers of Metropolitan Area low income projects, shall include in the contract provisions that such owners and managers market their units to persons eligible to reside in such low-income projects through the Clearinghouse/Network established herein in addition to any other marketing efforts. In the course of HUD monitoring reviews of these owners and managers, HUD will examine the compliance of such owners or managers with such contract provisions.

VI. ADMINISTRATION OF TENANT-BASED SECTION 8 PROGRAM

A. Mobility Counseling for Certificate and Voucher Holders

69. Federal and Minneapolis Defendants shall provide funding to create a Housing Mobility Counseling

Program, at a budget estimated to be approximately $1,409 per household, which shall be designed to assist persons seeking to use either mobility certificates, relocation certificates or regular MPHA certificates or vouchers outside areas of minority - or - poverty - concentration. Federal and Minneapolis Defendants shall fund, or arrange funding for the program at a level sufficient to serve 850 regular MPHA Section 8 households over three years in addition to funding these services for 900 households obtaining mobility or relocation certificates. Notwithstanding the above two sentences, HUD's sole obligtion is to provide MPHA with $1, 750,000 for use in the Housing Mobility Counselling Program, within 90 days after the approval of the Decree by the Court.. The Metropolitan Council will contribute up to $100,000 to fund any additional costs of this program. The Minneapolis Defendants shall fund or arrange for the funding of the remaining cost of theprogram described in the next paragraph, up to $615,000, primarily from CDBG funds and foundation grants and donations. In the event the budgeted amounts become insufficient to perform the counseling tasks set out herein, the Minneapolis Defendants agree to take all reasonable efforts to seek additonal funding from sources other than HUD.

70. The purpose of the Housing Mobility Counseling Program is to remove as many barriers as possible which impede the exercise of informed choice by class members in determining where they will use their Section 8

certificate. These barriers include lack of information about other neighborhoods and cities, lack of information about portability features and exception rents in the Section 8 program, lack of transportation, lack of child care, difficulty in effectively applying for available units, difficulty in satisfying tenant screening requirements, landlord unfamiliarity or misconceptions regarding the Section 8 program, illegal discrimination, language barriers, and lack of assistance with transition related problems following a move. To that end, the program will include the following elements:

a. Providng Section 8 recipients with detailed information about locational options in non-concentrated areas, both in Minneapolis and throughout the Metropolitan Area;

b. Providing services to assist recipients as they look for housing, including transportation, escort services and child care;

c. Providing intensive counseling and advocacy, as needed, to recipients to assist them to pass standard tenant screening procedures;

d. Assisting recipients with needed transitions after the move: help finding schools, churches, child care, employment; locating needed social services, etc.; assistance and support in

reducing any sense of isolation and in resolving disputes with neighbors;

e. Providing assistance and appropriate referrals to recipients who encounter illegal discrimination;

f. Marketing the program to landlords in non-concentrated areas;

g. Counseling regarding homeownership options when HUD implements a program permitting the use of Section 8 assistance with homeownership;

h. Interpreting for foreign language speakers and people with language disabilities.

71. Various elements of the program will be administered by one or more nonprofit organizations under contract with the MPHA. The MPHA and the Plaintiffs shall agree on the selection of the nonprofit entities. Such approval by Plaintiffs shall not unreasonably be withheld. MPHA shall promptly select the nonprofit entities and begin program operations within six months of entry of this Consent Decree. Any nonprofit entities are subject to approval by HUD Headquarters. Persons in receipt of relocation and mobility

certificates will have first priority for housing counseling services, but all persons with certificates or vouchers seeking housing outside areas of minority concentration are eligible for such services.

72. The organization(s) administering the housing mobility counseling program shall determine by the end of the program's first year whether lack of transportation is a major impediment to locating in suburban areas. If so, the parties agree to jointly seek a solution to this problem, which may include, but is not limited to, seeking expansion of public transportation.

73. Individual named Plaintiffs participating in MPHA's Section 8 certificate/voucher program at the time the housing mobility counseling program is initiated shall have first priority for access to such services, and any individual named Plaintiffs who subsequently participate in the Section 8 certificate/voucher program shall have first priority for such services upon receipt of a certificate or voucher.

74. The Metropolitan Council has begun a pilot program in cooperation with the MPHA and St. Paul PHA to provide mobility counseling services, similar to those set out above, to certificate and voucher holders in the Minneapolis and St. Paul programs (50 households in each program.) HUD will contribute $100,000 to this pilot program and the Metropolitan Council is funding remaining costs up to $50,000. In light of the Metropolitan Council's desire to immediately initiate its pilot program, HUD will include, in

the agreement pursuant to which HUD grants the aforementioned $100,000 to the Metropolitan Council, a provision that will allow the Metropolitan Council to reimburse itself, up to that amount, for costs that the Metropolitan Council may incur, prior to execution of that grant agreement, for Section 8-authorized mobility counseling activities carried out pursuant to the pilot program.

B. Improvement In Administration Of MPHA Certificate Program.

1. Recruitment of Landlords

75. MPHA will take the following steps to increase participation in the Section 8 program of landlords who control property located in Nonconcentrated areas of Minneapolis:

a. MPHA will obtain, from the Minneapolis Inspections Department, a list of all owners of rental property in non-impacted areas. This list will identify the size of the unit, the number of units owned by each landlord, and whether the landlord is a Repeat Offender Code Compliance Initiative landlord or owns property with recent serious code violations. The list will be updated annually.

b. MPHA will develop a marketing strategy for the Section 8 program as follows. MPHA will consult with Plaintiffs in developing this strategy:

1. MPHA will survey the literature on techniques used to recruit landlords.

2. MPHA will hire a marketing consultant.

3. MPHA will survey a sample from the landlord list developed in 1 above, selected to provide a valid sample of various types of landlords (e.g.., "mom and pop;" part-time owners; full-time professionals) to identify interest in and barriers to participation in the Section 8 program. Landlords with serious code violations will be excluded from the sample.

4. MPHA will devise and implement a marketing strategy, based on the results of the survey, which will include:

i. changes in program administration to address landlords' concerns, to the extent permitted by HUD regulations.

ii. periodic mailings to all owners

iii. attempts to recruit landlords to market the program to other landlords.

c. MPHA will continue to work closely with the Minnesota Multi-Housing Association, the Star-Tribune FONAHOME staff, and similar entities to promote the Section 8 program among real estate professionals.

d. Implementation of this program will begin no later than six months from entry of the Decree.

e. The MPHA agrees to work with the Metropolitan Council and others interested to affirmatively recruit to the Section 8 program more landlords who control property outside Minneapolis which is not located in

minority - or - poverty - concentrated areas.

2. Information Packet.

76. The MPHA, in consultation with Plaintiffs, shall revise the informational packets provided to MPHA Section 8 certificate and voucher holders, as necessary, within 30 days of the commencement of the Housing Mobility Counseling Program.

3. Exceptions To Fair Market Rents.

77. The parties agree that in certain circumstances exceptions to Fair Market Rent limits may be necessary to enable class members to use certificates outside areas of minority concentration, both within Minneapolis and in the suburbs. MPHA agrees that in such circumstances, subject to the limitations of 24 C.F.R. Part 882, it will provide exception rents within its jurisdiction. In order to determine which nonconcentrated areas within the City of Minneapolis have rent levels sufficiently high that exception rents of 10% or 20% will be necessary, the MPHA will undertake a study, the design of which will be made reasonably acceptable to Plaintiffs, of rent levels at the census tract level, broken down by unit size, throughout Minneapolis.

78. Following the study of rent levels by census tracts, MPHA agrees to promptly apply to HUD for permission to provide blanket exception rents of up to 120% of fair market rents for such tracts in Minneapolis. This study will be undertaken as soon as practicable after HUD has determined fair market rents for this Metropolitan Area for

fiscal year 1995, but by no later than 90 days from entry of the Decree. HUD shall grant such permission for such exception rents if MPHA's application is consistent with federal regulations. In addition, MPHA shall consider exception rents up to 20% on a unit-by-unit basis for class members seeking housing in nonconcentrated areas outside blanket exception rent areas, where special circumstances may exist.

4. Voucher Payment Standards.

79. The MPHA has undertaken the analysis necessary to adjust its voucher payment standard and will apply to HUD for an increase in the voucher payment standard to 100% of FMRs within 30 days of signing of this Decree by the parties. HUD will promptly review the application, and will approve the increase unless the application fails to meet applicable statutes or regulations. MPHA will review its voucher payment standard on an annual basis to ensure that the voucher payment standard is sufficiently high so as to enable class members holding vouchers to exercise a wide choice of available units in nonconcentrated areas.

5. Provision Of Services.

80. To the extent the MPHA Housing Mobility Counseling Program provided for herein is unable to provide services to class members with either mobility certificates or regular certificates or vouchers who are seeking to move, MPHA shall ensure that services are provided to said class

members as required by statutes and regulations generally applicable to the Section 8 Program.

VII. FAIR HOUSING MOBILITY CLEARINGHOUSE/NETWORK

81. MPHA agrees to fund, as set out in the next sentence, a Metropolitan Area-wide housing mobility Clearinghouse/Network designed to maximize access to existing low-income housing, particularly for central city residents of minority- and poverty-concentrated areas least likely to otherwise apply for housing throughout the Metropolitan Area. MPHA shall provide $500,000 per year for five years from its Comprehensive Grant funds to the Clearinghouse/Network for use in connection with assisting and establishing mechanisms and procedures to assist public housing residents and applicants to obtain housing.

82. The parties agree to jointly develop this housing mobility Clearinghouse/Network which, through intergovernmental cooperation and coordination and contracting with nonprofit entities, would:

a. plan, establish, and coordinate procedures for implementing a coordinated or consolidated subsidized housing application process and/or waiting list.

b. provide information on Metropolitan

Area-wide housing opportunities to all low-income applicants for federal housing programs;

c. coordinate metropolitan-wide landlord recruitment for the Section 8 program; and

d. provide information to low-income families seeking affordable housing and information and coordination to the current network of home-finding assistance providers to maximize access by low-income families to existing affordable housing and homeownership opportunities, especially those located in non-concentrated areas.

83. The Clearinghouse/Network activities would be coordinated with housing counseling services for Section 8 recipients described above, although these housing counseling services would not necessarily be carried out by the Clearinghouse/Network.

84. In developing and implementing the Clearinghouse/Network, the parties will involve social service agencies, private owners of low-income housing projects, and non-party government agencies such as the Minnesota Housing Finance Agency (MHFA)(with its oversight over privately owned Section 8 projects) and Hennepin County.

Within 60 days of entry of the Decree, the Metropolitan Council will convene a working group consisting of representatives of the parties, governmental entities, housing and social service agencies, and other appropriate providers. The working group will examine funding and operational issues and make recommendations for implementing the Clearinghouse/Network. The Metropolitan Council will provide staff assistance and direction as needed to enable the working group to complete the planning and development of the Clearinghouse/Network. The Clearinghouse/Network will begin operation within one year of entry of the Decree.

85. After receiving notice from the parties that operation of the Clearinghouse/Network is imminent, HUD shall promptly notify all current owners of HUD-assisted housing in the Metropolitan Area of the existence of the Clearinghouse/Network established herein and encourage them to participate in the Clearinghouse/Network's activities.

VIII. AFFIRMATIVELY FURTHERING FAIR HOUSING: SYSTEMS TO ANALYZE AND OVERCOME IMPEDIMENTS TO METRO WIDE FAIR HOUSING AND LOCATIONAL CHOICE

A. Housing Planning Documents.

86. With respect to Consolidated Plan Submissions of Metropolitan Area local governmental units to HUD, HUD shall require each jurisdiction to submit a certification that it will affirmatively further fair housing, which means it will conduct an analysis to identify impediments to fair housing choice within the jurisdiction, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions in this regard. The analysis of impediments that the local governmental units certify to conduct shall include identifying their policies which affect opportunities of minority households to select housing in the jurisdiction. In the event HUD subsequently adopts regulations which conflict with the preceding sentence, such subsequent regulations shall prevail.

87. The Metropolitan Council will commence coordinating housing planning documents on a Metropolitan Area-wide basis as soon as feasible following entry of the Decree. To assist units of general local government and other participating jurisdictions to fulfill their responsibilities to draft and submit such housing planning documents, the Metropolitan Council will: (1) identify the unmet need for affordable housing for low-income households throughout the Metropolitan Area; (2) develop metropolitan and community indices to serve as standards to encourage appropriate types of local goverment activities to achieve a metropolitan distribution of affordable housing, alternative housing types

and tenure and rehabilitation of existing housing; and (3) assist in the coordination of Metropolitan Area strategies to achieve a metropolitan distribution of affordable housing. Within 60 days of entry of the Decree, HUD will retain one of its consultants to perfrom studies with regard to items (1), (2), and (3) above. The studies will be made availabel to the other parties. Upon signing of this Decree by the parties, the other parties will begin to review and work with HUD in arriving at a scope of work order for the consultant and in the production of the work. All parties will provide the HUD consultant with any relevant data in their possession that is requested.

B. Fulfilling Responsiblities To Affirmatively Further Fair Housing.

88. In the event HUD determines that any local government receiving federal funds for housing and urban development is unlawfully impeding or failing to coorperate with proposals by the Minneapolis Defendants to site replacement housing for Minneapolis residents within the local goverment's jurisdiction, HUD shall take whatever enforcement action it deemsappropriate against that local governmental entity to enforce such obligations, including, but not limited to, judicial enforcement, or suspension, abatement or conditioning of future federal funding, until such time as the jurisdiction complies with its obligations. In addition, HUD shall, if it deems it appropriate, refer determinations of

non-compliance to other federal executive agencies for review and possible issuance of sanctions with respect to that agency's funding of the recipient, pursuant to Presidential Executive Order 12892 of January 17, 1994 (Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing). HUD shall cooperate with the local parties in developing strategies, including incentives, to encourage cooperation by all suburban jurisdictions, regardless of whether they are currently recipients of HUD funding. Nothing in the preceding sentence shall be construed as obligating HUD to provide funding beyond that which is specifically provided in this decree.

89. HUD shall review annually each Metropolitan Area local government's performance under its Consolidated Plan including specifically, the certification described in parpagraph 86 and, where appropriate, under 24 C.F.R. §§ 570.904(c) and 570.601(b). Reviews will include site visits by employees in so far as practicable and evaluation of the government's performance reports. In the event HUD determines that a government's performance violates its legal obligations, HUD shall take whatever enforcement action it deems appropriate including, but not limited to, judicial enforcement, or suspension, abatement or conditioning of future federal funding, until such time as the jurisdiction complies with its obligations. In addition, HUD shall, if it deems it appropriate, refer determinations of non-compliance

to other federal executive agencies for review and possible issuance of sanctions with respect to that agency's funding of the recipient, pursuant to Presidential Executive Order 12892 of January 17, 1994.

90. Within six months after the entry of the Decree, HUD shall require, to the extent practicable, each Metropolitan Area housing provider that uses a local residency preference with respect to any federally assisted housing, to provide information that HUD may determine to be relevant to an analysis of possible racially discriminatory effects of the preference. Within six months of receipt of the data, HUD shall analyze this, and any other relevant data and determine, for each residency preference, whether the preference has an adverse discriminatory effect with respect to racial minorities. In the event HUD determines that any local residency preference has an adverse discriminatory effect, HUD shall take whatever enforcement action it deems appropriate, which can include requiring the housing provider to eliminate the preference or modify it to eliminate the discriminatory effect.

91. For purposes of this Decree, all obligations set out herein apply both to grantees which constitute consortiums of smaller sub-grantees, and each of the sub-grantees themselves. In the case of consortiums where a sub-grantee is failing to fulfill its responsibilities set out herein, the consortium grantee is responsible for ensuring compliance by the sub-grantee, and the consortium grantee may, if

necessary, suspend or terminate sub-grants to the sub-grantee.

92. HUD shall send to the Chief Executive Officer of each local governmental jurisdiction in the Metropolitan Area which is a recipient of federal housing and urban development funds a letter, at the beginning of each federal fiscal year, with respect to certain relevant portions of this Decree. The letter shall: 1) encourage jurisdictions to participate in developing housing planning documents with the Metropolitan Council as described in paragraph 87; 2) inform them about the replacement housing provisions in the Decree and the provisions concerning HUD's review of performance under their certifications to affirmatively further fair housing; 3) encourage them to enter into cooperation agreements for replacement housing; and 4) advise them that the failure to sign a cooperation agreement will be taken into consideration by HUD in determining whether they are failing to comply with their certifications to affirmatively further fair housing. HUD shall provide the other parties with a copy of this letter and a list of the recipients each year.

93. Although HUD does not concede that any provision of the Decree grants the Court jurisdiction to review any HUD enforcement decision, HUD recognizes its responsibilities under Section 808(e)(5) of the Fair Housing Act (42 U.S.C. § 3608 (e)(5)), which requires it to administer its programs in a manner to affirmatively further fair housing, and will make enforcement decisions in a manner that is consistent with that section.

C. Metropolitan Area Housing Policy Activities

94. The Metropolitan Council is considering and has a variety of housing policy activities underway which are intended to assist local governmental units meet their statutory responsibility under Minnesota Statutes Chapter 473 to adopt local land use plans and implementation programs for providing adequate opportunities to meet existing and projected local and regional housing needs. These housing policy activities may include:

a. a housing profile that looks at each community's share of lower income households, units affordable to those households, forecasts of population and households, household composition and household income distributions, number of subsized housing units, rent distribution, and housing value distribution;

b. an analysis and report on this information;

c. an index and analysis of selected variables like low-income households and affordable units establishing a norm and analyzing each community's relationship to the norm; and

d. a review and analysis of barriers to the production of lower cost housing using existing information.

95. The analysis set out in paragraph 94 may be incorporated into other appropriate Metropolitan Council policy work and may be applied to appropriate Metropolitan Council decisions and recommendations regarding the Metropolitan Council's funding, construction, or approval of regional wastewater and transportation facilities. The Metropolitan Council will redraft its review guidelines for comprehensive plan housing elements to encourage affordable and life cycle housing in local planning and implementation activities and, when the Metropolitan Council determines it is appropriate, it will conduct negotiations with the affected units of local government to determine the steps necessary to facilitate such housing. The Metropolitan Council will prepare affordable housing comments on major regional facility reviews and may undertake work related to recommendations on the rehabilitation and redevelopment process after completing the housing redevelopment and rehabilitation study required under 1994 Minnesota Laws Chapter 577. For the purposes of this paragraph, affordable housing means housing affordable to households of low and moderate income.

IX. RELEASE OF CLAIMS

96. Except for claims which arise after the date upon which this Decree is filed, upon Court approval of this Consent Decree and subject to the rights of the parties to enforce this Consent Decree, all parties mutually release and forever discharge every claim, cross-claim, counter-claim, right, cause of action and issue, known and unknown, under federal, state or common law which any party (including its officers, employees, agents, successors or assignees) has asserted or could have asserted against any other party (including their officers, employees, agents, successors or assignees) in this action by reason of, or with respect to, or in connection with, or which arises out of any matters alleged in this action through the date upon which this Consent Decree is terminated. In the event sections of this Decree are nullified pursuant to paragraph 110, any claims released herein relevant to those sections shall be reinstated and this paragraph shall have no effect as to those claims.

X. DISPUTE RESOLUTION

97. The parties may attempt to resolve disputes relating to this Decree in any manner, however before seeking relief from the Court, the parties must comply with the procedures set out in this paragraph. Any allegation of a failure to comply with the terms and conditions of this Decree by one or more of the parties shall be by written notice to all counsel of record. The notice shall specify the facts

supporting the allegation, and shall precede the filing of any motion to enforce the terms of this Decree. Upon receipt of the notice by counsel, the alleged defaulting party shall either remedy the alleged failure and so notice all other counsel in writing, or provide written explanation within thirty (30) days, or within ten (10) business days in the case of an alleged violation involving an individually affected class member. At the end of such period, if the issue is not resolved, any party may seek relief from the Court.

XI. HUD REVIEW OF COMPLIANCE

98. In conducting compliance reviews of Minneapolis Defendants in connection with the public housing and Section 8 certifcate/voucher programs, HUD shall evaluate Minneapolis Defendants' compliance with the provision of this Decree and take such action to ensure Minneapolis Defendants' compliance as HUD deems appropriate and is permitted under law.

XII. CLASS CERTIFCATION

99. The parties have previously agreed pursuant to stipulation and Court Order dated July 5, 1994, and hereby reiterate that, for the purpose of this Decree, the plaintiff class should be certified and defined as follows:

minority families and individuals who, at any

time during the period beginning with court certifciation of the class and continuing through completion of implementation of any relief that may be ordered in this case:

1) hold Section 8 tenant-based certificates or vouchers administered by the Minneapolis Public Housing Authority ("MPHA") or are on the MPHA waiting list for, and are eligible to receive, such certificates or vouchers; or

2) reside in any of the public housing projects owned by the MPHA and specified herein (Mn 2-1, Glendale Apartments; Mn 2-2, Olson Apartments, excluding the Bryant Highrise; Mn 2-3, Lyndale Apartments, excluding 800 North 5th Street Highrise; Mn 2-4, Glenwood Apartments; Mn 2-5, Sumner Field Homes; Mn 2-7, Sumner Annex; Mn 2-25B, Near North Apartments; Mn 2-13, Mn 2-38, Mn 2-39, Mn 2-40, Mn 2-43, Mn 2-44, Mn 2-45, Mn 2-47, Mn 2-48, scattered

site projects; including replacement units for Mn 2-2, Mn 2-3, and Mn 2-5 that are in existence at the time of class certification) or are on the MPHA waiting list for, and are eligible to be placed in public housing owned by the MPHA.

100. Upon execution by all parties, the parties shall promptly file this proposed Consent Decree with the District Court and request the Court enter an order:

a. preliminarily approving the proposed settlement as fair, reasonable and adequate;

b. approving publication and dissemination of a class action notice containing the settlement terms, the date of the final hearing, and the right to comment or object.

c. scheduling a final hearing to determine the fairness, reasonableness, and adequacy of the proposed settlement and whether the Court should approve the Consent Decree.

101. Pursuant to FED. R. CIV. P. 23(e), all class members shall be given notice, the form of which shall be agreed upon by counsel for all parties, or by the Court in the event that there is no such agreement, of the terms of the Consent Decree and their right to object to the terms thereof. MPHA shall post the notice in all MPHA offices and other government and social service agency offices where class members are likely to frequent, as well as pay for radio

announcements. Special means, including but not limited to translation of notices, shall be devised to provide effective notice to foreign language speakers. MPHA shall also mail (with address correction requested) or deliver the notice to: (1) class member who hold Section 8 tenant-based certificates or vouchers; (2) class members who are on the waiting list for public housing or Section 8 certificates or vouchers; and (3) residents of the public housing projects owned by MPHA and specified in paragraph 99. MPHA will publish the class notice for one day in a Sunday edition of the *Minneapolis Star Tribune,* for one day in a Sunday edition of the *Saint Paul Pioneer Press*, as well as community newspapers serving predominantly minority areas of Minneapolis. Counsel for all parties shall be provided a copy of the addresses of all persons to whom the notice is mailed or delivered. Class members will have until 10 days before the date of the fairness hearing within which to file written objections to the proposed terms of this Consent Decree. Between the signing of this Consent Decree and the fairness hearing, the Defendants shall direct all inquiries regarding the Decree from class members to Plaintiffs' counsel. For the purposes of this paragraph, the date of signing of this Decree is the date that the last party signs the Consent Decree. All of the Defendants shall share equally in the cost of this notice.

102. A fairness hearing shall be held at such time and place as ordered by the Court to consider whether the proposed Consent Decree should be finally approved as fair,

reasonable, and adequate. Any class member who has submitted a timely written objection may appear at the hearing and show cause why this Consent Decree should not be approved. Objections raised at the hearing will be limited to those matters addressed in timely written objections.

XIII. MONITORING OF THE DECREE

103. During the first year following entry of this Decree, Defendants shall file a report with the Court and the parties each three months, which shall describe the activities carried out and the results achieved in implementing this Decree. During the second and third years following entry of this Decree, such reports must be filed every six months. After three years, such reports must be filed at least annually until such time as the obligations of the Defendants terminate under this Decree.

104. HUD shall maintain statistics that it normally receives on the racial/ethnic identity of heads of households for each project or unit location in all HUD assisted housing programs in the Metropolitan Area. MPHA and the Metropolitan Council shall maintain similar data for their respective assisted housing programs. MPHA shall also maintain data enabling the parties to track the moves of all Section 8 participants who receive housing counseling

services throughout the term of this Decree. Upon written request, MPHA shall provide such statistical information to Plaintiffs.

105. Upon reasonable advance written notice, Defendants shall make available free for inspection and copying pursuant to the Minnesota Government Data Practices Act and other applicable state and federal law governing access to and disclosure to government data or information, any documents requested by Plaintiffs relating to Defendants' compliance with the terms of this Decree.

106. The terms of this Decree shall apply to the Plaintiffs and Plaintiff class, and to each of the Defendants, their officers, directors, agents, employees, successors and assigns. All entities or persons acting in concert or participating with Defendants and who receive notice of this Decree are enjoined from interfering with, obstructing or otherwise frustrating the implementation of this Decree.

XIV. RETENTION OF JURISDICTION

107. The Court will retain jurisdiction over this matter for the purpose of enabling any party to this proceeding to apply to the Court for such further orders as may be necessary or appropriate for the enforcement of this Decree. In the event any occurrences outside the control of the parties frustrate the completion of the actions agreed to herein, any party may apply to the Court for modification of

this Decree, but not to increase any party's obligations under the Decree. Prior to the submission of any dispute under the Decree to the Court, the parties shall comply with the dispute resolution procedure set out in paragraph 97.

108. Plaintiffs and the Minneapolis Defendants have identified a number of additional government entities with potential liability in this lawsuit including, but not limited to: the State of Minnesota, the Minnesota Housing Finance Agency, Hennepin County, and various Cities and Public Housing Authorities within the Metropolitan Area. Because the current parties began settlement discussions early in the litigation, these additional entities were not joined at the date on which this Decree was entered. However, the parties reserve their right to move the Court pursuant to the All Writs Act, 28 U.S.C. § 1651(a) or any other basis, for joinder of any additional entities or for injunctive or other relief necessary or useful in order to fully effect the relief ordered in this Decree.

109. The Consent Decree terminates and the Court's jurisdiction over each Defendant shall end seven years after the entry of this Decree unless a party moves before that date to have the Court extend its jurisdiction over a Defendant. The Court may extend its jurisdiction over that Defendant only if it determines that the Defendant has not complied with a specific obligation imposed in the Decree on that Defendant. If the Court extends its jurisdiction over a Defendant, such jurisdiction shall end upon the fulfillment of

the specific obligation.

XV. SUBSEQUENT LEGISLATION

110. In the event Congress or the State of Minnesota subsequently enacts legislation which conflicts with any obligations as set out in this Decree, such subsequent federal or state legislation shall control. Defendants shall not be obligated to carry out any term of this Decree if any otherwise applicable current or future federal or state statute or regulation precludes Defendants from complying with, or withdraws Defendants' authority to perform that term. HUD's funding commitments are based on the availability of present appropriations. In the event that Congress rescinds or otherwise reduces the appropriations such that the funding becomes unavailable to perform the obligations specified in paragraphs 32, 61, 69, and 74, HUD is relieved from funding those obligations; however, this decree shall be dissolved to the extent it resolved issues addressed by HUD's now rescinded funding commitments, and the parties shall resume litigation of remaining issues, subject to the dispute resolution procedures of paragraph 97.

XVI. ATTORNEYS' FEES AND COSTS

111. HUD and the Minneapolis Defendants shall pay to Plaintiffs attorneys' fees and costs in the amounts to be

stated in one or more agreements to be executed simultaneously with this Decree. The Plaintiffs and the Minneapolis Defendants shall not assert any claims for attorney fees or costs against the Metropolitan Council. No Defendants shall be liable for attorneys fees or costs beyond these amounts, except that it Plaintiffs subsequently move the Court for enforcement of the Decree, and the Court finds any Defendant to be in violation of the Decree, Plaintiffs may apply to the Court for an award of fees with respect to that Defendant.

XVII. OTHER TERMS AND CONDITIONS

112. The signature of the parties on the Decree constitutes a Settlement Agreement for purposes of reservation of funds only. Upon signature, HUD will immediately reserve the funds specified in paragraphs 32, 61, 69, and 74.

113. No Defendant shall be held in violation of this Consent Decree because of the amendment, modification, revocation or absence of statutory or regulatory authority necessary for compliance.

114. The claim that any violation of this Decree is caused by circumstances beyond the control of a Defendant may be considered by the Court in any motion by any party to enforce the Decree.

115. Except as expressly provided herein, this Consent Decree shall have no effect on any Defendant's authority to administer, manage or operate its Public Housing and Section 8 Housing programs.

116. The Defendants do not admit, and expressly deny, that they are subject to any liability whatsoever by reason of the matters alleged in this action. This Consent Decree and all the documents, negotiations and proceedings related to it are not, and shall not be construed to be an admission by the Defendants of any lability with respect to the allegations, claims and cross-claims in this action. This Consent Decree shall not be offered or be admissible in evidence against the Defendants in any action or proceeding except any action or proceeding to enforce its terms.

117. With the exception of the additional agreements to be negotiated pursuant to paragraphs 24 67, and 111, this Consent Decree and its attachments shall constitute the entire understanding and agreement of the parties. No statement, remark, agreement or understanding, oral or written, which is not contained herein, shall be recognized or enforced. This Decree shall not be subject to any change, modification, amendment, or addition without the express written consent of all parties to this Decree, except as provided for in paragraph 107 above.

118. This Decree shall be binding upon and inure to the benefit of the parties hereto and their representatives, heirs, successors and assigns.

119. This Consent Decree shall be construed under and governed by the laws of the State of Minnesota and applicable federal law.

120. This Consent Decree may be signed in counterpart.

SO ORDERED
APRIL 20, 1995

/s/James M. Rosenbaum
District Court Judge

Approved as to Plaintiffs:

Dated: 3/1/1995

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COUNSEL FOR FEDERAL DEFENDANTS

3/8/95
DATED

Approved as to Defendants Cora McCorvey and Minneapolis Public Housing Authority:

Dated: March 8, 1995
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Minneapolis Public
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Dated: March 8, 1995
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Dated: March 8, 1995

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FOR THE CITY OF MINNEAPOLIS

CITY OF MINNEAPOLIS

By /s/Sharon Sayles Belton
Mayor

Attest /s/Merry Keefe
City Clerk

Countersigned /s/ John Moir
Finance Officer

Approved for execution:

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March 8, 1995

FOR THE METROPOLITAN COUNCIL

Date: 3/7/95 /s/ Curtis W. Johnson
Curtis W. Johnson, Chair

Date: 3/7/95 /s/ James J. Solem
James J. Solem,
Regional Administrator

Date: 3/8/95 /s/ Thomas C. McElveen
Thomas C. McElveen,
HRA Unit Manager

Date: 3/8/95 /s/ Jay M. Heffern
Jay M. Heffern,
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Date: 3/8/95

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APPENDIX A

MPHA Scattered Site Disposition Policy

APPROVED
MINNEAPOLIS PUBLIC HOUSING AUTHORITY
Item No. 7

September 1, 1993

REPORT TO THE COMMISSIONERS

FROM: Cora McCorvey, Executive Director

SUBJECT: Scattered Site Disposition Policy

Previous Directives: Supports agreement with plaintiffs in Hollman, et al. vs. Cisneros, et al.
Resident Council Review/Recommendation: Not applicable.
Budget Impact: Long-term lower operating costs by replacing older units with substantial maintenance costs with newer lead-free units.
Affirmative Action Compliance: Replacement units will expand housing opportunities for MPHA residents.
RECOMMENDATION: IT IS RECOMMENDED THAT THE ATTACHED SCATTERED SITE DISPOSITION POLICY BE APPROVED.

There are 377 scattered site units in minority identified census tracts, 53% of the MPHA inventory. Of these units, 113 were built before 1960 or have not received major modernization work within the past five years. These are the units that are most likely to need lead paint abatement and substantial rehabilitation.

The following disposition policy is recommended:

> The MPHA will dispose of units within the minority identified census tracts unless there is a compelling reason to preserve the unit. Such compelling reasons include large number of bedrooms (four or more), above average unit features (high quality construction, very functional floor plan), and above average neighborhood amenities (parks, shopping, schools).

Staff would conduct and document an evaluation based on the following factors:

1. Estimated rehabilitation and lead paint abatement cost;
2. Number of bedrooms;
3. Floor plan (below average, average, above average);
4. Neighborhood amenities (below average, average, above average);
5. Heating cost, compared to MPHA average by bedroom size;

6. Proximity to other scattered site houses;
7. Opportunity and feasibility of a development project to improve all assisted units and/or other on the block.

This evaluation will be completed by October 30, 1993.

This report was written by Lisa Kugler. For further information, please call 342-1403.

DOCUMENT No. 93-114P

APPENDIX C

Statutes & Constitutional Provisions

28 U.S.C. § 1331.
Federal question, *Page C-191*

28 U.S.C. § 1367.
Supplemental jurisdiction, *Page C-192*

28 U.S.C. § 1441.
Actions removable generally, *Page C-194*

28 U.S.C. § 1446.
Procedure for removal, *Page C-196*

28 U.S.C. § 1447.
Procedure after removal generally, *Page C-199*

28 U.S.C. § 1651.
Writs, *Page C-201*

Minnesota Constitution, Art. I, § 2
Rights and privileges, *Page C-202*

Minnesota Constitution, Art. XIII, § 1
Uniform system of public schools, *Page C-203*

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if --

(1) the claim raises a novel or complex

issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For the purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court

against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after

commencement of the action.

(c) (1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall

order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(f) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

28 U.S.C. § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join

additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Minnesota Constitution
Article I

§ 2. Rights and privileges

Sec. 2. No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers. There shall be neither slavery nor involuntary servitude in the state otherwise than as punishment for a crime of which the party has been convicted.

Minnesota Constitution
Article XIII

§ 1. Uniform system of public schools

Section 1. The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.

APPENDIX D

STATE OF MINNESOTA
COUNTY OF HENNEPIN
DISTRICT COURT, FOURTH JUDICIAL DISTRICT

MINNEAPOLIS BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,ET AL.
v.
STATE OF MINNESOTA, ET AL.

Class Action Complaint
filed, September 19, 1995
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STATE OF MINNESOTA COUNTY OF HENNEPIN
DISTRICT COURT FOURTH JUDICIAL DISTRICT
CASE TYPE: MC

Minneapolis Branch of the National Association for the Advancement of Colored People, on behalf of themselves and all others similarly situated; Bryston Hill, by His Next Friend, Lisa Hill; Sophie Krahnke, by Her Next Friends, Steven Krahnke and Jane McLeod; Miquel McElroy, by His Next Friend, Annie Pearl McElroy; Gregory McFarland, by His Next Friend, Linda McFarland; Solveig and Anna Mebust, by Their Next Friends, Bruce Lynn Mebust and Kristen Ann Scribner Mebus; and Diamond Porter, by His Next Friend, Jamie Porter, Plaintiffs,	)	Court File: 95-14800

vs.	)	**CLASS ACTION**
State of Minnesota; Arne H.	)	**COMPLAINT**
Carlson, Governor, State	)	
of Minnesota; Minnesota	)	
State Board of Education;	)	
Jeanne Kling (President),	)	
George Jernberg (Vice-	)	
President), Robert J. Brown,	)	
Erling Johnson, Thomas	)	
Lindquist, Tom Peacock,	)	
Shamus Roller, Nedra	)	
Wicks, Members of the	)	
Minnesota State Board of	)	
Education; Minnesota	)	
State Department of	)	
Education; Ann Schluter,	)	
Commissioner of	)	
Education; Minnesota	)	
Senate; Allan H. Spear,	)	
President of the Minnesota	)	
Senate; Minnesota House	)	
of Representatives; Irv	)	
Anderson, Speaker of	)	
the Minnesota House of	)	
Representatives; Robert	)	
Miller, Director of the	)	
Office of Desegregation/	)	

Integration of the Minnesota)
Department of Education;)
Michael A. McGrath, State)
Treasurer; Judith Dutcher,)
State Auditor; Hubert H.)
Humphrey III, Minnesota)
Attorney General; and The)
Metropolitan Council,)
a Public Body Corporate)
and Politic,)
Defendants.)

Plaintiffs above-named, for their complaint against defendants above-named, complain and allege as follows:

NATURE OF ACTION

1. This lawsuit is brought on behalf of a class of children enrolled, or expected to be enrolled during the pendency of this action, in the Minneapolis Public Schools, Special School District No. 1, in order to redress the denial to the plaintiff class by the defendants of the fundamental right of the plaintiff class to receive an adequate education, a right secured to the plaintiff class by the Education Clause of the Minnesota Constitution, Article XIII, Section 1, and by the Equal Protection Clause of the Minnesota State Constitution, Article I, Section 2. The Minneapolis Public Schools have been in the past and currently are segregated on the basis of

both race and socioeconomic status, such that members of the plaintiff class attend schools the enrollment of which is disproportionately comprised of minority students and students living in poverty, as compared with neighboring and surrounding suburban school districts. Members of the plaintiff class are therefore confined to schools that are separate in terms of both racial composition and socioeconomic composition. As a matter of both law and fact, such schools are not equal to neighboring and surrounding suburban schools. Because such schools are separate and unequal, the education the students receive is per se inadequate within the meaning of the Education Clause and Equal Protection Clause of the Minnesota Constitution. Schools within Minnesota concentrate students by poverty and race. These students so concentrated in Minneapolis are capable of learning and performing at an adequate educational level, as measured by widely accepted standards. The educational environment in which they are placed, however, with its concentration of poverty and race and the negative effects incident thereto, depresses their educational achievement. The State, which has known for some time of these patterns of segregation and resulting educational outcomes, has the capacity to discharge its constitutional obligation to provide these class members with an adequate education, but has failed to do so. Because the Constitution requires that the plaintiff class receive an adequate education as a fundamental right, the defendants are required by law to

remedy the inadequate education being received by the plaintiff class, regardless of whether the defendants have caused, contributed to, or are at fault for this inadequacy. Alternatively, the defendants must remedy the inadequacy of the education being received by the plaintiff class, because the defendants in fact have caused, are responsible for, and are at fault for this inadequacy by reason of the acts and omissions of defendants described hereinafter.

THE PARTIES

2. The Minneapolis Branch of the National Association for the Advancement of Colored People ("NAACP") is a non-profit association located in the city of Minneapolis and dedicated to the protection and promotion of civil rights, civil liberties, and social justice for its members and society at large. The Minneapolis Branch of the NAACP is a branch of the NAACP, the nation's oldest and largest civil rights organization. As set forth more fully hereafter, the violations of law set forth hereafter have interfered with the efforts of the Minneapolis Branch of the NAACP to achieve racial and social justice for its constituency, are a constant drain on its resources, and cause it injury in fact.

3. Bryston Hill is a 13-year old African-American. He resides in the city of Minneapolis with his mother, Lisa Hill, who brings this action as his next friend. He is enrolled in the eighth grade at Sanford Junior High School.

4. Sophie Krahnke is a 4-year old Caucasian. She resides in the city of Minneapolis with her parents, Steven Krahnke and Jane McLeod, who bring this action as her next friends. She expects to enrol in the Minneapolis public schools in September of 1996.

5. Miquel McElroy is a 14-year old African-American. He resides in the city of Minneapolis with his mother, Annie Pearl McElroy, who brings this action as his next friend. He is enrolled in the seventh grade at Franklin Elementary School.

6. Gregory McFarland is a 13-year old African-American. He resides in the city of Minneapolis with his mother, Linda McFarland, who brings this action as his next friend. He is enrolled in the eighth grade at Folwell Junior High School.

7. Solveig Mebust is an 11-year old Caucasian; Anna Mebust is an 8-year old Caucasian. They reside in the city of Minneapolis with their parents, Bruce Lynn Mebust and Kirsten Ann Scribner Mebust, who bring this action as their next friends. They are enrolled in the fifth and third grades, respectively, at Andersen Open School.

8. Diamond Porter is a 15-year old African-American. He resides in the city of Minneapolis with his mother, Jamie Porter, who brings this action as his next friend. He was last enrolled in the tenth grade at Washburn High School.

9. Defendant State of Minnesota is the duly

constituted government and territory of Minnesota established by the Constitution of 1857 and Act of Congress of May 11, 1858. Defendant Arne H. Carlson is the Governor of the State of Minnesota and is sued in that capacity. Pursuant to Minn. Stat. § 121.02, he is responsible for appointing the members of the State Board of Education, with the advice and consent of the Senate. Pursuant to Minn. Stat. § 121.14, Governor Carlson receives recommendations from the State Board of Education and Commissioner of Education concerning modification and unification of laws relating to the State's system of education that will make those laws more readily understood and more effective in execution; and Governor Carlson further receives a biennial education budget containing a complete statement of finances pertaining to the maintenance of the State Department of Education and to the distribution of state aid for education. As the chief executive officer of the State of Minnesota, Governor Carlson is ultimately responsible for ensuring that the plaintiff class is fully accorded and not deprived of its fundamental rights under the Education and Equal Protection Clauses of the Minnesota Constitution.

10. Defendant State Board of Education is charged with direction of the State Department of Education and the State Commissioner of Education and with adopting goals for and exercising general supervision over public schools and public educational agencies in the State of Minnesota, and classifying and standardizing public elementary and

secondary schools, and preparing for them outlines and suggested courses of study, with a plan to attain the adopted goals, pursuant to Minn. Stat. § 121.11. The State Board of Education is also authorized to make rules relating to desegregation/integration, and in adopting such rules, the State Board is required to address the need for equal educational opportunities for all students and racial balance. Defendant State Department of Education is a State department existing under and subject to the jurisdiction and direction of the State Board of Education and Commissioner of Education, and is charged with the responsibility of carrying out their policies and directives with regard to education in the State of Minnesota, including, but not limited to, desegregation/integration. Pursuant to Minn. Stat. § 119A.01, discussed hereafter, the State Department of Education and the position of Commissioner of Education will cease to exist effective September 30, 1995, and all employees of the Department of Education will become employees of a newly created Department of Children, Families, and Learning effective October 1, 1995.

11. Defendants Jeanne Kling (President), George Jernberg (Vice-President), Robert J. Brown, Erling Johnson, Thomas Lindquist, Tom Peacock, Shamus Roller, and Nedra Wicks are members of the State Board of Education of the State of Minnesota and are sued in that capacity; as such, these defendants exercise general supervision over the Department of Education, Commissioner of Education, and

public schools and public educational agencies in the State of Minnesota, as set forth in the immediately foregoing paragraph.

12. Defendant Ann Schluter is the Commissioner of Education for the State of Minnesota, appointed by the Governor, and is also the Secretary of the State Board of Education, as provided in Minn. Stat. § 121.16, and is sued in that capacity. The Commissioner performs duties prescribed by law and by the rules of the State Board of Education, and is responsible for the efficient administration and discipline of the State Department of Education. The Commissioner makes recommendations to the State Board of Education and is charged with the execution of powers and duties as prescribed by the State Board, from time to time, to promote public education in the State of Minnesota, to safeguard the finances pertaining thereto, and to enable the State Board of Education to carry out its duties, as provided in Minn. Stat. § 121.16. The Commissioner is further required to review all education-related mandates in state law or rule once every four years to determine which mandates fail adequately to promote public education in the State of Minnesota, and is to report the findings of said review to the education committees of the Minnesota State Legislature by February 1 in the year following the completion of the review, as provided in Minn. Stat. § 121.16, subd. 3. The Commissioner is further charged with coordination of the activities of the Office of Desegregation/Integration in the Minnesota Department of

Education with new/or existing Education Department and State Board of Education efforts to accomplish school desegregation/integration, as provided in Minn. Stat. § 121.1601.

13. Defendant Minnesota Senate is a legislative body established by Article IV, Section 1 of the Minnesota Constitution. Defendant Allan H. Spear is the President of the Minnesota Senate and is sued in that capacity. As one of the two houses of the Minnesota Legislature, the Minnesota Senate is charged with the responsibility under Article XIII, Section 1 of the Minnesota Constitution, to establish a general and uniform system of public schools and to make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the State of Minnesota.

14. Defendant Minnesota House of Representatives is a legislative body established by Article IV, Section 1 of the Minnesota Constitution. Defendant Irv Anderson is the Speaker of the Minnesota House of Representatives and is sued in that capacity. As one of the two houses of the Minnesota Legislature, the Minnesota House of Representatives is charged with the responsibility under Article XIII, Section 1 of the Minnesota Constitution, to establish a general and uniform system of public schools and to make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the State of Minnesota.

15. Defendant Robert Miller is the Director of the Office of Desegregation/Integration of the Department of Education of the State of Minnesota and is sued in that capacity. The Office of Desegregation/Integration coordinates and supports activities related to student enrollment, student and staff recruitment and retention, transportation, and interdistrict cooperation among metropolitan school districts, pursuant to Minn. Stat. § 121.1601. Under Minn. Stat. § 121.1601, the Office of Desegregation/Integration may become involved in cooperative desegregation/integration efforts, by, inter alia, assisting districts with interdistrict student transfers, including student recruitment, counseling, placement, and transportation; coordinating and disseminating information about schools and programs; assisting districts with new magnet schools and programs; assisting districts in providing staff development and in-service training; and coordinating and administering staff exchanges. The Office of Desegregation/Integration further collects data on the efficacy of desegregation/integration efforts of school districts and makes recommendations based on the data. Under Minn. Stat. § 121.1601, the Office of Desegregation/Integration is also required periodically to consult with the Metropolitan Council to coordinate school desegregation/integration efforts with the housing, social, economic, and infrastructure needs of the metropolitan area.

16. Defendant Michael A. McGrath is the

Treasurer of the State of Minnesota and is sued in that capacity. Pursuant to Article V, Section 1 of the Minnesota Constitution, the Treasurer is an executive officer of the State of Minnesota, and is responsible for the disbursement of all monies by the State of Minnesota. Pursuant to Minn. Stat. § 121.163, subd. 3, the State Treasurer is the custodian of all monies received from the United States for aid to public education in the State of Minnesota, and has responsibility for the disbursement of such federal funds on requisitioning of the Commissioner of Education through the state payment system for purposes consistent with the respective acts of Congress and federal grant.

17. Defendant Judith Dutcher is the Auditor of the State of Minnesota and is sued in that capacity. Pursuant to Article V, Section 1 of the Minnesota Constitution, the State Auditor is an executive officer of the State of Minnesota, and is responsible for the adjusting and settling of all public accounts and demands. Pursuant to Minn. Stat. § 121.11, the State Auditor cooperates with the State Board of Education in establishing and carrying into effect a uniform system of accounting by public school officers.

18. Defendant Hubert H. Humphrey III is the Attorney General of the State of Minnesota and is sued in that capacity. Under Article V, Section 1 of the Minnesota Constitution, the Attorney General is an executive officer of the State of Minnesota, and is the chief law enforcement officer of the State of Minnesota. Pursuant to

Minn. Stat. § 121.17, the State Attorney General is responsible for considering and resolving all questions as to the proper construction of state laws applicable to education, and is required, on request of the Commissioner of Education, to issue binding written opinions on questions of the interpretation of education law in Minnesota. The State Attorney General is also charged with and responsible for enforcement of laws of the State of Minnesota against discrimination, including, but not limited to, unlawful racial discrimination in education and housing.

19. Defendant Metropolitan Council is a political subdivision of the State of Minnesota, established by Minn. Stat. § 473.123, created to coordinate the planning and development of the Twin Cities metropolitan area. The Metropolitan Council has the same functions, rights, powers, duties, privileges, immunities, and limitations as are provided for housing and redevelopment authorities created for municipalities. Pursuant to Minn. Stat. § 121.1601, the Metropolitan Council periodically consults with the Office of Desegregation/Integration of the Department of Education to coordinate school desegregation/integration efforts with the housing, social, economic, and infrastructure needs of the metropolitan area.

MAINTENANCE OF THIS ACTION AS A CLASS ACTION

20. Plaintiffs bring this action as a class action on

behalf of a plaintiff class consisting of all students enrolled, or expected to be enrolled during the pendency of this action, in the Minneapolis public schools, Special School District No. 1; and ask this Court to certify this action as a class action on behalf of said class.

21. This action is appropriately maintainable as a class action because the class is so numerous that joinder of all members is impracticable, in that the class numbers in the tens of thousands; there are questions of law or fact common to the class including, but not limited to, whether the Minneapolis public schools are segregated on the basis of race or socioeconomic status, whether the education provided by the Minneapolis public schools is adequate, and whether the defendants have engaged in the conduct alleged in this complaint; the claims of the named plaintiffs are typical of the claims of the class; and the named plaintiffs will fairly and adequately protect the interests of the class. In addition, questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

CONDUCT GIVING RISE TO VIOLATIONS OF LAW

22. School children in public schools throughout the State of Minnesota, including the city of Minneapolis and

its adjacent suburban communities, are largely segregated by race and socioeconomic status.

23. Although African-Americans comprise only three percent of Minnesota's school age population, and children in families below the United States Department of Agriculture's official "poverty line" comprise only 12 percent of Minnesota's school age population, the public schools of the city of Minneapolis are 47 percent African-American and over 55 percent poor. St. Paul has similar statistics. From 1982 to 1994, children receiving free and reduced cost lunch in the Minneapolis public schools increased from 33 to 52 percent of enrollment; and the percentage of minority children in Minneapolis public schools increased from 34 to 59 percent.

24. The school age populations in almost all other suburban school districts surrounding or contiguous to the Minneapolis public school district, by contrast, are overwhelmingly white. In addition, such suburban school districts also have a far lesser incidence of children below the poverty line. Defendants thus are maintaining and permitting to be operated a school system in the city of Minneapolis that is segregated on the basis of race and socioeconomic status and that is separate from the school systems in the surrounding and neighboring suburbs in its concentration of minority students and students living in poverty.

25. Segregated or separate schools are not equal to non-segregated schools as a matter of law, pursuant to the

decision of the United States Supreme Court in Brown v. Board of Education, 347 U.S. 483 (1954).

26. Because the plaintiff class is receiving a segregated education in the Minneapolis public schools, the education provided to the plaintiff class is unequal and constitutionally infirm. A segregated education is per se an inadequate education under the Education Clause of the Minnesota State Constitution, and further constitutes an infringement of the right of the plaintiff class to the equal protection of the laws under the Equal Protection Clause of the Minnesota State Constitution.

27. In addition to receiving an inadequate education as a matter of law, the plaintiff class is in fact receiving an inadequate education and being deprived of an adequate education. Minneapolis public schools contain a far greater proportion of students, at all levels, living in poverty in neighborhoods with high levels of poverty than do suburban schools. This concentration of poverty leads to a concentration of social, physical, economic, and child development problems that negatively impact both students and schools. Concentrated poverty, as exists in parts of the city of Minneapolis, when carried into the public schools, directly results in lower school achievement, wholly without regard to considerations of race. Racial segregation, on top of socioeconomic segregation, further exacerbates these problems and worsens educational outcomes. The cumulative responsibility for educating this high proportion of students

living in poverty places the Minneapolis public schools at a severe educational disadvantage in comparison with the suburban schools. Because the Minneapolis public schools must devote disproportionately large resources to dealing with the many problems and difficulties that accompany poverty and racial segregation, the Minneapolis public schools lack adequate resources to provide and maintain staffing, staff development, facilities, textbooks, science equipment, computers, sports, extra-curricular activities, and other necessities and accoutrements of an adequate education.

28. Many of the students in Minneapolis not only perform substantially below suburban students attending schools where poverty and minority enrollment are not concentrated, but also fail to perform at levels of adequacy accepted and recognized by the State. The State has failed these students both in comparison with other students and based on an absolute standard of what is adequate.

29. All children, including those in the plaintiff class, have the capacity to learn if given a suitable education. Because the Minneapolis public schools have an extraordinary proportion of children living in poverty among their student populations, however, the Minneapolis public schools operate at a severe educational disadvantage in addressing the educational needs of all students--not only those who are poor, but those who are not. The sheer proportion of students living in poverty imposes enormous educational burdens on the individual students, teachers,

classrooms, and schools within the city of Minneapolis. These burdens are then substantially worsened by racial segregation. These burdens have deprived both the poor children and all other Minneapolis school children of their right to an equal educational opportunity.

30. Faced with these severe educational burdens, schools in the Minneapolis school district have been unable to provide educational opportunities that are substantially equal to those received by school children in the suburban districts.

31. As a result, the overall achievement of school children in the Minneapolis public schools, assessed by virtually any measure of educational performance, is substantially below that of school children in the suburban districts.

32. For example, non-graduation rates in the city of Minneapolis are many times greater than non-graduation rates in the suburban districts. While Minneapolis public schools have approximately a 33 percent non-graduation rate, suburban schools generally average below 12 percent. Similarly, standardized test scores for children in the Minneapolis public schools fall substantially below scores for children enrolled in suburban schools.

33. Other measures of educational achievement reveal the same pattern of disparities. The suburban schools rank far ahead of the Minneapolis public schools when measured by the percentage of high school graduates who

enter four-year colleges, the percentage of graduates who enter any program of higher education, and the percentage of graduates who obtain full-time employment within nine months of completing their schooling.

34. The racial and socioeconomic segregation of the Minneapolis public schools necessarily limits not only the equal educational opportunities of the plaintiff class, but their potential employment as well, inasmuch as a large percentage of all employment growth in the Twin Cities metropolitan area is occurring in the suburban districts, and suburban students have a higher rate of success in obtaining employment with many metropolitan area businesses.

35. The inadequacy of the education being received by the plaintiff class is the result of the educational and social policies pursued and/or accepted by the defendants, including the racial and socioeconomic segregation of the Minneapolis public schools.

36. Specifically, the defendants have engaged in or permitted the following practices, which have causes or contributed to the segregation of the Minneapolis public schools:

(a) Defendants have neither developed nor implemented and enforced effective rules or an effective plan for desegregation/integration or for remedying the inadequacy of the education being received by the plaintiff class, although defendants know and have known for some time of segregation

and the inadequacy of education in the Minneapolis public schools. For example, although defendant State Board of Education has a rule that minority enrollment in a school may not be more than 15 percent above the district wide average for minority enrollment, defendants have wholly failed to enforce this rule, and have knowingly permitted approximately 25 schools to be segregated in violation of the rule, including seven in the city of Minneapolis. Defendant State Board of Education has further replaced as chairperson Georgina Stephens, an African-American board member, because Ms. Stephens expressed an interest in developing and implementing an effective desegregation plan. Defendant State Department of Education has also laid off and discharged employees responsible for testing, measuring, and improving educational outcomes, a circumstance that will render increasingly difficult providing plaintiff class members with an adequate education.

(b) Defendants have authorized, approved, and consented to school construction and other capital expenditures and improvements with respect to education that have reenforced and contributed to the entrenchment of existing concentrations of poverty and racial isolation and inadequacy of education in the Minneapolis public schools.

(c) Although obligated to do so, the defendants have failed to coordinate school desegregation/integration efforts with the housing, social, economic, and infrastructure needs of the metropolitan area.

(d) Defendants have adopted, implemented, and permitted policies and practices that result in housing segregated by race and socioeconomic status in the metropolitan area, and thereby result in segregation by race and socioeconomic status in the Minneapolis public schools. Such policies and practices include, but are not limited to, for example, failure of the Metropolitan Council and the State to enforce Policy 39 from the June 1985 Housing Development Guide; failure of the Metropolitan Council to require adoption and enforcement by suburban communities of comprehensive plans including efforts to promote the development of low and moderate income housing; failure of defendants to take steps to prevent and eliminate exclusionary zoning practices by suburban communities; disproportionate investment in infrastructure in suburban communities with the effect of intensifying and perpetuating racial and socioeconomic segregation; failure to enforce Minnesota laws against segregation that would curtail and eliminate such practices as red-lining, steering, and restrictive covenants; and the implementation of

transportation policies that have encouraged and enabled "white flight" to suburbs.

(e) In an effort to evade their constitutional responsibilities to provide an adequate and desegregated education to the plaintiff class, defendants State of Minnesota, Minnesota Senate, Minnesota House of Representatives, Carlson, Spear, and Anderson have caused to be enacted into law Minn. Stat. § 119A.01, abolishing the Commissioner of Education and the Department of Education effective September 30, 1995, and transferring the employees of the Department of Education to the newly created Department of Children, Families, and Learning effective October 1, 1995. The purpose and effect of this legislation are to frustrate and evade efforts to remedy unlawful desegregation in public schools in the State of Minnesota, and to frustrate and evade efforts to redress inadequacy of education for Minnesota school children.

VIOLATIONS OF LAW ALLEGED DEPRIVATION OF ADEQUATE EDUCATION--STRICT LIABILITY

37. As set forth more fully hereinabove, the plaintiff class is receiving an education in the Minneapolis public schools that is both per se inadequate because it is segregated, and in fact inadequate because it is substandard by any reasonably objective measure, and because it is

unequal to the education being provided in surrounding suburban school districts. The plaintiff class has a fundamental right under the education clause of the Minnesota Constitution, Article XIII, Section 1, to an adequate education, which is not being provided. Accordingly, regardless of whether or not they have caused or contributed to the deprivation of the fundamental right of the plaintiff class to an adequate education, defendants are required by law, under Article XIII, Section 1 of the Minnesota Constitution, to provide the plaintiff class with an adequate education and to remedy forthwith the deprivation and violation of the fundamental right to an adequate education of the plaintiff class. The plaintiff class is therefore entitled to injunctive and other equitable relief requiring defendants to remedy the deprivation of the fundamental right of the plaintiff class to an adequate education, and requiring the defendants to provide the plaintiff class forthwith with an adequate education.

DEPRIVATION OF ADEQUATE EDUCATION– CAUSED OR CONTRIBUTED TO BY CONDUCT OF DEFENDANTS

38. As set forth more fully hereinabove, the conduct of defendants described herein has caused the plaintiff class to receive an education in the Minneapolis public schools that is both per se inadequate because it is segregated, and in fact inadequate because it is substandard

by any reasonably objective measure, and because it is unequal to the education being provided in surrounding suburban school districts, and defendants have thereby deprived the plaintiff class of its fundamental right to an adequate education under the Education Clause of the Minnesota Constitution, Article XIII, Section 1, such that the plaintiff class has been injured and damaged as a direct and proximate result of the defendants' conduct, and is entitled to injunctive and other equitable relief requiring defendants to cease and desist from the conduct described hereinabove, to remedy the deprivation of the fundamental right of the plaintiff class to an adequate education, and to provide the plaintiff class forthwith with an adequate education.

DENIAL OF EQUAL PROTECTION

39. As set forth more fully hereinabove, the conduct of defendants described hereinabove has caused the plaintiff class to receive an education in the Minneapolis public schools that is both per se inadequate because it is segregated, and in fact inadequate because it is substandard by any reasonably objective measure, and because it is unequal to the education being provided in surrounding suburban school districts, and defendants have thereby denied to the plaintiff class the equal protection of the laws, in violation of the Equal Protection Clause of the Minnesota State Constitution, Article I, Section 2, such that the plaintiff class has been injured and damaged as a direct and proximate

result of the conduct of defendants described hereinabove, and is entitled to injunctive and other equitable relief requiring defendants to cease and desist from the conduct described hereinabove, to remedy the denial of the equal protection of the laws to the plaintiff class, and to provide the plaintiff class forthwith with a desegregated and adequate education.

PRAYER FOR RELIEF

WHEREFORE the plaintiff class demands judgment against the defendants as follows:

A. Certifying the plaintiff class alleged herein and the named plaintiffs as class representatives, and finding that this action may proceed as a class action on behalf of the plaintiff class;

B. Finding, adjudging, and decreeing that the defendants have engaged in the violations of law set forth hereinabove;

C. Permanently enjoining the defendants from continuing to engage in the violations of law set forth hereinabove, ordering the defendants to remedy the violations of law set forth hereinabove, and ordering the defendants to provide the plaintiff class forthwith with an adequate and desegregated education;

D. Awarding to the plaintiff class their costs and disbursements herein, including their reasonable attorneys' fees incurred in the prosecution of this action; and

E. Granting to the plaintiff class such other and further relief as to the Court may appear just and appropriate.

Dated: September 19, 1995.

SHULMAN, GAINSLEY & WALCOTT, P.A.

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MINNESOTA STATUTE SECTION 549.21 ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements, and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. Sec. 549.21, subd. 2, to the parties against whom the allegations in this pleading are asserted.

/s/ Daniel R. Shulman
Daniel R. Shulman, #100651

Supreme Court, U.S.
FILED
JAN 22 1998
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No. 97-1048

In the

Supreme Court of the United States

October Term, 1997

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Minneapolis Branch on behalf of themselves and all others similarly situated; BRYSTON HILL, by His Next Friend Lisa Hill; SOPHIE KRAHNKE, by Her Next Friends Steven Krahnke and Jane McLeod; MIQUEL MCELROY, by His Next Friend Annie Pearl McElroy; GREGORY MCFARLAND, by his Next Friend Linda McFarland; SOLVEIG MEBUST and ANNA MEBUST, by their Next Friends Bruce Lynn Mebust and Kirsten Ann Scribner Mebust; DIAMOND PORTER, by His Next Friend Jamie Porter,

Petitioners,

v.

METROPOLITAN COUNCIL,
a Public Body Corporate and Politic,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the All Writs Act authorize removal of an action when necessary in aid of a federal court's jurisdiction to protect the integrity of a prior federal consent decree?

2. The second question presented by petitioners -- whether the artful pleading doctrine authorizes removal of claims which are artfully pleaded as state claims to evade federal jurisdiction and which are precluded by a prior federal judgment on a question of federal law -- does not raise an issue addressed by the court of appeals and, thus, is not appropriate for review.

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STATUTES

All Writs Act, 28 U.S.C. § 1651 ..... *passim*

Respondent Metropolitan Council opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered on September 17, 1997.

STATEMENT OF THE CASE

The relevant background of this case is set forth in detail in the court of appeals' decision, National Association For The Advancement of Colored People, Minneapolis Branch v. Metropolitan Council, 125 F.3d. 1171 (8th Cir. 1997) (Petition Appendix ("Pet. App.") A). The following facts are provided to correct inaccuracies and omissions in Petitioners' Statement Of The Case.

Defendant-Respondent Metropolitan Council removed and successfully moved to dismiss this lawsuit, NAACP et al. v. Metropolitan Council, because Plaintiffs-Petitioners Minneapolis Branch of the NAACP attempted to relitigate claims against the Metropolitan Council which were settled by the NAACP and others, and which are subject to the ongoing jurisdiction of the federal court in Hollman v. Cisneros, Civ. No. 4-92-712 (U.S. Dist. Ct., Dist. Minn., Fourth Div.).

A. The Hollman Litigation

In 1992, the Minneapolis Branch of the NAACP and a class of low-income minority families sued several federal and local agencies and governments, alleging, among other things, that the defendants segregated minority public housing tenants by causing a large portion of Minneapolis family public housing to be sited in minority- or poverty-concentrated neighborhoods.[1] Pet. App. B-64-67. The plaintiffs added the

[1] The class that was certified was comprised of minority families and individuals who are current participants in the Minneapolis Public Housing Authority ("MPHA") Section 8 Certificate/Voucher Program, eligible

Metropolitan Council as a defendant in 1994, contending that alleged segregation in Minneapolis public housing was the product of metropolitan area-wide exclusionary housing policies for which the Metropolitan Council partly was responsible. The Hollman plaintiffs alleged:

> 76. At the same time that the Met Council has stopped holding suburban communities accountable for low income housing development, the Council has accelerated the polarization of the metro area by income and race by repeatedly approving funding for infrastructure expenditures such as sewer extensions, roads, and schools in many of the same suburban communities that have the least low income housing and the most exclusionary housing policies.
>
> 77. Had the Council enforced its own rules in the last decade, suburban low income housing opportunities would be significantly greater today. Application of Policy 39 to all funding applications by suburban communities would have compelled them to facilitate the production of low and moderate income housing . . . .

Pet. App. B-93-94 (emphasis added). These "actions and inactions" the Hollman plaintiffs concluded, "have perpetuated and entrenched patterns of residential racial segregation in the metro area. . . ." Pet. App. B-95-96.

The Hollman litigation was settled in April 1995. The settlement was memorialized in a consent decree issued by the federal district court. The decree sets out numerous complex

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persons on the waiting list for Section 8, persons residing in family public housing units owned by the MPHA, and eligible persons on the waiting list for public housing owned by the MPHA. Pet. App. B-170-172.

obligations and specific commitments of the Metropolitan Council to help further the deconcentration of racially concentrated housing in Minneapolis, and provides that the defendants will provide in excess of $100 million in federal and local resources toward that end. See, generally, Pet. App. B-120-190.

All parties to the Hollman decree, including the NAACP, mutually released and discharged all claims, known and unknown, under federal, state or common law which could have been asserted in Hollman and which arise out of any matters alleged in Hollman. Pet. App. B-169. The district court expressly retained jurisdiction to issue "such further orders as may be necessary or appropriate for the enforcement" of the decree. Pet. App. B-175-176. The decree terminates in April 2002. Pet. App. B-176.

B. The NAACP Litigation

Plaintiffs-petitioners Minneapolis Branch of the NAACP and individuals purporting to represent a class of Minneapolis school children (collectively "NAACP") commenced this action in Hennepin County District Court, State of Minnesota, on September 19, 1995, against the State of Minnesota, the governor and other state officials (collectively "state defendants"), and the Metropolitan Council. On its face, the Complaint purported to invoke only Minnesota state law. The NAACP plaintiffs claimed, in part, that the Minneapolis public schools are unlawfully segregated because of housing segregation allegedly caused by the Metropolitan Council's housing and related policies and practices:

> (d) Defendants have adopted, implemented, and permitted policies and practices that result in housing segregated by race and socioeconomic status in metropolitan area, and thereby result in segregation

by race and socioeconomic status in the Minneapolis public schools.

Pet. App. D-224 (emphasis added). The NAACP plaintiffs sought to permanently enjoin these policies and practices and sought an order requiring the Metropolitan Council "to remedy the violations of law." Pet. App. D-228.

C. Proceedings Below

The Metropolitan Council timely removed this case pursuant to 28 U.S.C. §§ 1441 and 1651, Pet. App. B-41-46, and moved to dismiss. The district court remanded as to all defendants except the Metropolitan Council. The district court determined that removal of claims against the Metropolitan Council was proper under 28 U.S.C. § 1441 because the claims were artfully pleaded claims virtually identical to federal claims settled and subject to the federal consent decree in Hollman. Pet. App. B-35-38; NAACP v. Minnesota, No. 3-95-968, slip op. at 3-6 (D. Minn. February 5, 1996), aff'd 125 F.3d 1171 (8th Cir. 1997). The district court also held, in the alternative, that removal was proper under the All Writs Act, 28 U.S.C. § 1651, to protect the integrity of the Hollman consent decree because "any remedy pertaining to Met[ropolitan] Council granted by the state court will necessarily overlap with the consent decree in place in Hollman . . . ." Pet. App. B-38; id. at 6.

The district court subsequently dismissed the claims against the Metropolitan Council as barred by res judicata. "Plaintiffs' allegations against Met[ropolitan] Council constitute, at their core, housing claims identical to those alleged and resolved in the earlier case of Hollman v. Cisneros." Pet. App. B-32; NAACP v. Minnesota, No. 3-95-968, slip op. at 20 (D. Minn. July 15, 1996), aff'd 125 F.3d 1171 (8th Cir. 1997).

The NAACP filed a petition for writ of mandamus seeking an order to remand this action to the Hennepin County District Court. The court of appeals denied the petition.

The court of appeals subsequently held that removal was proper under the All Writs Act because the action was not removable under the federal removal statutes and "the district court was confronted with a situation where parties subject to the district court's continuing jurisdiction under the Hollman decree . . . were resorting to a state forum to relitigate settled and released claims." Pet. App. A-6; NAACP, 125 F.3d at 1173. Because it concluded that removal was proper under the All Writs Act, the court of appeals did not determine -- contrary to the impression fostered by petitioners -- whether removal was warranted under the artful pleading doctrine. Pet. App. A-7; id. at 1174.

The court of appeals affirmed the application of res judicata and the dismissal of the claims against the Metropolitan Council. "[A]s far as the claims against the Met[ropolitan] Council are concerned, this suit and Hollman involve the same cause of action." Pet. App. A-9; id.[2]

REASONS FOR DENYING THE WRIT

A writ of certiorari is unwarranted. The court of appeals' decision that removal was proper under the All Writs Act is entirely consistent with this Court's precedents and legal principles, and does not conflict squarely with the decisions of the other courts of appeal. In addition, the court of appeals did not reach the district court's alternative ground for removal under the artful pleading doctrine. Therefore, the decision below does not raise the second question presented in the petition.

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[2] Petitioners do not challenge in this petition the application of res judicata to their claims.

I. THE COURT OF APPEALS' DECISION THAT REMOVAL WAS PROPER UNDER THE ALL WRITS ACT IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND LEGAL PRINCIPLES, AND DOES NOT CONFLICT SQUARELY WITH THE DECISIONS OF THE OTHER COURTS OF APPEAL.

A. The Court Of Appeals' Decision Is Consistent With This Court's Precedents.

Contrary to petitioners' contention, the court of appeals' decision is consistent with this Court's admonitions that the All Writs Act "is a residual source of authority" and that power under the Act "is to be used sparingly." See Petitioners' Brief at 16. This Court made clear in Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34 (1985), that the All Writs Act "empowers federal courts to fashion extraordinary remedies when the need arises . . ." in situations not otherwise covered by statute. Pennsylvania Bureau of Correction, 474 U.S. at 43. In this case, the court of appeals expressly found such an extraordinary situation. "Although this class action is not removable under the federal removal statutes, the district court was confronted with a situation where parties subject to the district court's continuing jurisdiction under the Hollman decree . . . . were resorting to a state forum to relitigate settled and released claims." Pet. App. A-6; NAACP, 125 F.3d at 1173.

Similarly, to the extent that Turner Broadcasting System, Inc. v. Federal Communications Commission, 507 U.S. 1301 (1993), even applies,[3] the court of appeals observed this

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[3] Unlike this case, Turner Broadcasting System dealt with this Court's power to enjoin an act of Congress pending a decision on the merits.

Court's caution in Turner Broadcasting System that power under the All Writs Act "is to be used sparingly." Id. at 1303. The court of appeals carefully limited its ruling to the extraordinary situation described above. "Faced with this circumstance, we believe the district court was warranted in authorizing removal under the All Writs Act to protect the integrity of the federal consent decree entered in Hollman . . . ." Pet. App. A-6; NAACP, 125 F.3d at 1173.

Further, the court of appeals' decision follows logically from United States v. New York Tel. Co., 434 U.S. 159 (1977), where this Court held that the All Writs Act empowers a federal court "to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." New York Tel. Co., 434 U.S. at 172. In this case, the district court properly obtained jurisdiction in Hollman and issued a decree barring relitigation of "any matters alleged" in the action. Pet. App. A-6; NAACP, 125 F.3d at 1173. The claims which petitioners asserted against the Metropolitan Council in this case were identical to the claims asserted by the NAACP and others against the Metropolitan Council in Hollman. "As against the Met[ropolitan] Council, this suit seeks what Hollman sought: to end the claimed segregative effect of the Met[ropolitan] Council's policies and practices concerning housing and related infrastructure projects in the Twin Cities' metropolitan area." Pet. App. A-9; id. at 1174; compare Pet. App. B-93-94 (¶¶ 76-77) and Pet. App. D-224 (¶ 36(d)). To permit petitioners to pursue the same claims in state court necessarily would have frustrated the Hollman relitigation bar, and any remedy that might have been granted in the state action would have interfered with the ongoing operation of the federal decree. Pet. App. B-38; NAACP v. Minnesota, No. 3-95-968, slip op. at 6 (D. Minn. February 5, 1996), aff'd 125 F.3d 1171 (8th Cir. 1997).

B. The Court of Appeals' Decision Does Not Conflict Squarely With The Decisions Of The Other Courts Of Appeal.

The court of appeals' decision is fully consistent with the decisions of the Second, Third, Sixth and Seventh Circuits, all of which recognize that the All Writs Act authorizes removal under extraordinary circumstances such as those presented in this case. See Davis v. Glanton, 107 F.3d 1044, 1047 n.4 (3rd Cir. 1997), cert. denied 118 S.Ct. 159 (1997); Matter of VMS Securities Litigation, 103 F.3d 1317, 1324 (7th Cir. 1996); Sable v. General Motors Corp., 90 F.3d 171, 175 (6th Cir. 1996); In re Agent Orange Product Liability Litigation, 996 F.2d 1425, 1431 (2nd Cir. 1993), cert. denied 114 S.Ct. 1125 (1994); Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 863 (2nd Cir. 1988), cert. denied 109 S.Ct. 1527 (1989).[4]

Moreover, contrary to petitioners' contention, the court of appeals' decision is not inconsistent with Westinghouse Electric Corp. v. Newman & Holtzinger, 992 F.2d 932 (9th Cir. 1993). In Westinghouse Electric Corp., the Ninth Circuit simply reiterated the well-settled principle that the All Writs Act does not operate to confer jurisdiction in the first instance; it only operates in aid of jurisdiction already obtained. Id. at 937. In this case, in contrast to Westinghouse Electric Corp., "[t]here is no dispute the district court properly obtained jurisdiction in Hollman." Pet. App. A-5; NAACP, 125 F.3d at 1173. Thus, the district court applied the All Writs Act in this

[4] Petitioners' assertion that the court of appeals' decision is somehow inconsistent with the Second Circuit's interpretation of the Act is puzzling. The court of appeals favorably cited and drew parallels to the Second Circuit cases which petitioners contend are inapposite. Pet. App. A-6-7; NAACP, 125 F.3d at 1173-74.

case in aid of jurisdiction otherwise obtained, not as an independent source of jurisdiction.[5]

C. The Court of Appeals' Decision Comports With Principles Of Federalism, And Does Not Delegate Judicial Power To Private Parties.

Contrary to petitioners' assertion, the court of appeals was sensitive to principles of federalism and comity. Faced with the choice of removal or enjoining the state court action, the court of appeals chose the least intrusive course. "[W]e think removal in this case better preserves state-federal relations than would resort to an injunction because it spares the Hennepin County District Court from expending judicial resources to no avail." Pet. App. A-7; id. at 1174; see also Yonkers Racing Corp., 858 F.2d at 864.

Petitioners' contention that the court of appeals "has deprived a class of more than 40,000 schoolchildren from litigating their state constitutional [education] claims in their state's courts," Petitioners' Brief at 20, simply is false. As the court of appeals found, the Metropolitan Council does not bear any responsibility for public education under Minnesota law. Pet. App. A-9-10; NAACP, 125 F.3d at 1175. Thus, petitioners have no state constitutional claims against the

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[5] Petitioners cite in passing, but understandably do not expound on, Hillman v. Webley, 115 F.3d 1461 (10th Cir. 1997), which is the only court of appeals decision that is marginally dissonant. Hillman held that the All Writs Act authorizes a federal district court to enjoin parties before it from pursuing conflicting litigation in state court, but does not authorize removal. Id. at 1469. Concurring only in the result, one member of the three-judge panel criticized the reasoning of the decision as being at odds with New York Telephone Co., and concluded that the All Writs Acts authorizes removal "in appropriate and narrow circumstances in aid of [a federal court's] jurisdiction." Id. at 1470 (Kelly, Jr., J., concurring in result), citing Matter of VMS Securities Litigation, supra; In re Agent Orange, supra; Yonkers Racing Corp, supra.

Metropolitan Council. Further, petitioners' claims against the state defendants, which the district court remanded, currently are proceeding in state court.

Finally, petitioners do not cite any case in support of their make-weight argument that the courts improperly delegated judicial authority because the courts "merely denied petitioners' motion to remand" and did not affirmatively issue a "writ" ordering removal. See Petitioners' Brief at 17-18. The All Writs Act is not so literally and narrowly construed. As this Court stated in New York Telephone Co., the Act empowers a federal court "to issue such commands . . . as may be necessary or appropriate . . . ." New York Telephone Co., 434 U.S. at 172. Obviously, an order denying a motion to remand and hence effectuating removal is such a command. See, e.g., In re Agent Orange, 996 F.2d at 1430-31. In any event, even if this issue were resolved in petitioners' favor, it would not affect the outcome. It is clear from the decisions that both the district court and the court of appeals determined that removal under the All Writs Act, whether directly or indirectly ordered, was appropriate.

II. THE DECISION BELOW DOES NOT RAISE A QUESTION APPROPRIATE FOR REVIEW REGARDING THE ARTFUL PLEADING DOCTRINE.

Petitioners' second question presents the issue of whether the artful pleading doctrine, as articulated in Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981), authorizes removal in this case. However, the decision below does not raise the issue presented.

Although the district court held, in the alternative, that removal was proper under the artful pleading doctrine, the court of appeals did not. "Because we conclude removal was proper under the All Writs Act, we need not determine

whether removal was also warranted under the artful pleading doctrine." Pet. App. A-7; NAACP, 125 F.3d at 1174.

In essence, petitioners are attempting a direct appeal from the decision of the district court to this Court. Direct appeals are restricted to situations prescribed by statute. See Bailey v. Patterson, 369 U.S. 31, 34 (1962). This case does not fall within the limited types of suits in which direct appeals are permitted. Therefore, in the absence of a ruling of the court of appeals regarding removal under the artful pleading doctrine, no reason exists for the grant of certiorari.[6]

[6] Petitioners' second question, improperly presented, is similar to the question presented in Rivet v. Regions Bank of Louisiana, F.S.B., 108 F.3d 576 (5th Cir. 1997), cert. granted 118 S.Ct. 31 (1997). However, even if petitioners' second question were properly before this Court, there would no reason to postpone consideration of this petition pending resolution of issues in Rivet because there is in this case independent ground for removal under the All Writs Act.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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